



When retirement is not golden: A classic Torrens tale with twists and turns — The value of a risk analysis approach

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This article traces almost a decade of litigation involving a retired couple who were lured into a scam that involved their unencumbered property in a seaside town in New Zealand. Its primary focus is on the importance of planning complex land transfer litigation, the end point of which will likely involve state compensation for an aggrieved original registered proprietor who has suffered deprivation (full or partial) of land or an estate or interest in land or who has sustained loss or damage by the wrongful inclusion of land in a title, and is barred by the operation of the Land Transfer Act 1952 (NZ) from bringing an action for possession or recovery of that land, estate or interest. The article promotes a simple fiscal risk analysis approach

Introduction

[T]he Burmeisters were, in a commercial sense, quite naïve. They had never enjoyed any particular financial success, and lacked any significant commercial experience, and they assumed that there were others more astute in the commercial world who were able to make money in ways that they did not comprehend. They were prepared to put their trust in Mr Geoffrey Clayton and those with whom he was associated, in the expectation that they would be sufficiently clever to make money without risk to them.¹

This article traces almost a decade of litigation involving a retired couple who did, indeed, put their faith in a fraudster who lured them into a scam that involved their unencumbered property at Mount Maunganui, New Zealand. It is a long and rather sad saga that, at face value, has a fairy-tale ending. The naïve Burmeisters not only put their faith in the fraudsters but also in New Zealand's legal process where undoubtedly they relied on our legal system, the legal profession and the courts to 'put [them] back the way they were'.²

The Burmeisters were involved in nine court decisions and the prolonged litigation undoubtedly led to considerable emotional stress. This article suggests that there may have been a more effective litigation path and sets out a model that might be useful in future similar scenarios. It is primarily an economic model based on a risk analysis approach for litigating parties and, as such, embraces a fundamental object of the Torrens system: 'to promote security of title and ease of transactions in order to support the operation of efficient land and capital markets.'³

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1 Comment from Asher J in *Burmeister v O'Brien* [2010] 2 NZLR 395; (2011) 12 NZCPR 9 at [228].

2 Ibid, at [2] per Asher J.

3 See P O'Connor, 'Double Indemnity — Title Insurance and the Torrens System' (2003) 3(1) *QUTLJ* 142 at 162, citing A Bradbrook, S McCallum and A Moore, *Australian Real*

Woven within this analysis are significant judicial interpretations of several important areas of Torrens law: land transfer fraud; the extent of the right of a registered proprietor deprived of land or an estate or interest in land by fraud to gain compensation, its measure and the running of time; the seminal case of *Dollars & Sense Finance Ltd v Nathan*⁴ in which New Zealand's highest court introduced the concept of vicarious liability for a mortgagee whose agent commits fraud; buy-back transactions and whether a security transaction can be linked under the Credit Contracts and Consumer Finance Act 2003; and, where appropriate, a glimpse of the proposed new Land Transfer Act.

Perhaps the most important of these, as one commentator notes,⁵ is the determination of the scope of a registered proprietor to obtain compensation under s 172(b) of the Land Transfer Act 1952 and the measure of that compensation.⁶ Precise judicial comment on both counts was fundamental.

This article nudges, but does not address, the on-going debate as to whether state compensation under the Torrens statutes should be complemented or replaced by private insurance.⁷ Rather, it describes the plight of a couple who were reliant solely on state protection and their story perhaps emphasises the need for further thought as to whether that protection is adequate.

Property Law, 3rd ed, Lawbook Co, 2002, at [4,129]. (See now Bradbrook, McCallum and Moore, *Australian Real Property Law*, 6th ed, 2015, [4.430]).

4 *Dollars & Sense Finance Ltd v Nathan* [2008] 2 NZLR 557; (2008) 9 NZCPR 116 (SC).

5 D McMorland, 'Compensation under the Land Transfer Act' (2014) 16 *Butterworths Conveyancing Bulletin* 75.

6 Nonetheless, since the Burmeister proceedings, there has been a further decision on the scope of s 172(b) of the Land Transfer Act 1952: *Schmidt v Registrar-General of Land* [2015] NZHC 2015. In this case, the plaintiff was a trustee of four trusts which, through a company, owned two properties. On the advice of a solicitor, these properties were transferred to a trustee company with an independent shareholder and director. That company became the registered proprietor of the properties and, subsequently, the properties were on-sold to bona fide third parties. The initial pleading was that the transaction to the trustee company was bona fide but then the trustee acted fraudulently when on-selling. The Registrar-General, applying for summary judgment, claimed that the Crown was not liable pursuant to s 178(a) of the Land Transfer Act 1952 which exempts Crown liability for a breach by the registered proprietor of any trust. The Crown argued that it was not liable to pay compensation when title is transferred to a trustee who is acting honestly but who later deals with the property fraudulently in such a way as to deprive the beneficiaries of their interest. The court considered that the provisions of the Act overall demonstrate that Parliament did not intend for the Crown to be liable for fraud by a trustee whenever it occurs. It considered s 128 of the Act ('No entry of trusts to be made on the register except as authorised') and s 178(a) as complementary; and further noted that under s 175 of the Act ('Recovery of compensation paid and costs in case of fraud') the Crown cannot recover compensation paid and costs where a trustee became registered proprietor without fraudulent intent but who later disposed of the land fraudulently. Nonetheless the application for summary judgment was dismissed. The court advised the plaintiff to re-plead her case to the effect that the transfer of the land to the trustee company was also part of the fraudulent scheme to deprive the trusts and their beneficiaries of their interests in the land (thus bringing the proceeding in line with the Burmeister scenario).

7 See, for instance, R Low and L Griggs, 'Going through the obstruction, the Torrens Assurance Fund and contemporary solutions — A Tale weaved from a story of a nun, a romantic triangle and sibling corruption', (2014) 23 *APLJ* 17; P O'Connor, 'Title insurance — Is there a catch?' (2003) 10 *APLJ* 120; P O'Connor, 'Double Indemnity — Title insurance and the Torrens System', above n 3; L Griggs, 'The Assurance Fund: Government Funded or Private?' (2002) 76 *ALJ* 250; J Flaws, 'Compensation for loss under the Torrens System — Extending State Compensation with Private Insurance' in *Torrens in the Twenty-First*

What happened to the Burmeisters?

In 2001, the Burmeisters, a retired couple, owned their own modest debt-free home at 1 Lotus Avenue, in Mount Maunganui, a seaside suburb of Tauranga, New Zealand.

The Burmeisters' income was limited to the community wage received by Mr Burmeister and the couple were not at the time eligible for superannuation. In an attempt to use the equity in their home to generate some income, they entered into an investment scheme introduced to them by John Clayton, a trusted friend. The scheme was promoted and organised by a number of people including Geoffrey Clayton, John Clayton's son.⁸ They understood that the title to their home would be transferred to a 'secure family trust' for a term of 3 years. In return, they were promised a weekly income of \$220.00 and two one-off payments of \$15,000.00 and \$7000.00. In September 2001, they signed what they thought was an acknowledgment that they were joining the investment scheme. However, in reality, this document was a blank Land Transfer Act 1952 (NZ) transfer form.

A short time later, John O'Brien, on behalf of Geoffrey Clayton, collected from the Burmeisters the title document and the discharge of mortgage. Without the Burmeisters' knowledge an agreement for sale and purchase of the Lotus Avenue property was drawn up: the vendor was ICMG (a company in which Geoffrey Clayton was involved) and the purchaser the O'Brien Trust. There was no mention of the Burmeisters in the document but their signatures were affixed. It was common ground that these signatures were forged.

The title was transferred to the trustees of the O'Brien Trust and the trustees were granted a mortgage of \$172,000.00 by the Auckland Savings Bank (ASB). In executing the mortgage for ASB, Mark Henley-Smith, the solicitor acting for both the trustees and the bank, was given detailed instructions that included an instruction that finance would only be approved if the purchase price (\$215,000.00) recorded on the sale and purchase agreement was the actual price paid on settlement. Henley-Smith was obliged to inform the bank immediately of any differences in those prices. The solicitor knew that under the scheme the Burmeisters had not received this consideration and consequently that the trustees were not a bona fide purchaser for value.

The Burmeisters' weekly payments were often erratic. By August or September 2002, Mr Burmeister started to think that something was seriously wrong. He approached Land Information New Zealand (LINZ) for a search of his title, and discovered that the property had been transferred to the trustees of the O'Brien Trust but, from the evidence available, there was no proof that he had been informed of the ASB mortgage. Alarmed, he requested a meeting with Geoffrey Clayton and others involved in the scheme. This took place on

Century, D Grinlinton (Ed), LexisNexis, Wellington, pp 397–423; A McCrimmon, 'Compensation Provisions in the Torrens Statutes: the existing structures and proposals for change' (1993) 67 *ALJ* 904.

⁸ In the substantive judgment on Land Transfer Act fraud, *Burmeister v O'Brien* [2010] 2 NZLR 395; (2009) 12 NZCPR 9, (see below at 'The proceedings against the registered proprietor — back on track') there was clear evidence that John Clayton 'absolutely trusted' his son (at [104]). The Claytons Snr placed their own home in the scheme and eventually had to sell their property and realise what little equity was left in it.

14 October 2002 and, although the meeting was somewhat heated, the Burmeisters were assured that their house was safe and in a trust which was secure. At that point they decided to accept those assurances. Nonetheless, problems with the weekly payments continued.

On 14 April 2003 the Burmeisters read an article published in the *Sunday Star Times* on 13 April 2003 describing a scam 'run by various members of ICMG'. Geoffrey Clayton was among the names mentioned. Thus the Burmeisters finally became aware that they had become victims of a scam and they approached independent solicitors.

The weekly payments ceased on 19 June 2003.⁹

The proceedings — a agonising decade of litigation

On 20 October 2005 the Burmeisters filed proceedings. These proceedings set off a train of litigation that spanned a period of almost 10 years.¹⁰

There were nine decisions.

The first three, from 30 August 2006 to 13 November 2008, related to the mortgage. The fourth, dated 1 December 2009, was the substantive proceeding concerning, inter alia, land transfer fraud. This was followed by a costs proceeding which gives a rare glimpse of the financial costs involved in this type of litigation. The succeeding four decisions were between the Burmeisters and the Registrar-General of Land and comprised arguments over limitation (both in the High Court and the Court of Appeal), compensation and the measure of damages. The details of these decisions are described in succeeding parts of this article.

The transfer: Fraud

In the substantive proceedings,¹¹ the Burmeisters, inter alia, made allegations of fraud under the Land Transfer Act 1952 (LTA 1952 (NZ)) against the remaining trustees of the O'Brien Trust (Mr and Mrs O'Brien).¹² They alleged forged documents in respect of the transfer of the property and the taking of the title by the trustees in the knowledge that the O'Brien Trust was not a bona fide purchaser for value.

⁹ As noted by Asher J in the substantive proceedings (*Burmeister v O'Brien* [2010] 2 NZLR 395; (2009) 12 NZCPR 9 at [28]), through the whole period of their participation in the scheme, the Burmeisters:

received in total approximately \$26,000.00, made up of a \$7000.00 payment towards their [overseas] trip, plus \$19,000.00 in weekly payments. This is to be contrasted with the \$57,000.00 they would have received over three years if the \$220.00 had been paid per week, and they had also been paid the two lump sums [\$15,000.00 and \$7,000.00] . . . It seems that some rates and insurance premiums were paid by ICMG but others were paid by the Burmeisters to avoid default.

¹⁰ There were other associated proceedings — for example, proceedings that the Burmeisters' caveat not lapse in 2005; and an application for a leave to appeal the test for which was not met (*Burmeister v O'Brien* (unreported, HC Tauranga, CIV-2005-470-3896, 13 November 2008).

¹¹ *Burmeister v O'Brien* [2010] 2 NZLR 395; (2011) 12 NZCPR 9. In these proceedings there were five defendants: Mr and Mrs O'Brien, Geoffrey Clayton, John Clayton and Mark Henley-Smith.

¹² When these proceedings were heard, Patricia Paterson had resigned as a trustee.

The Burmeisters were successful in this claim.

The mortgage: Credit Contracts and Consumer Finance Act 2003/Fraud

The Burmeisters sought relief against the trustees, Geoffrey and John Clayton, Mark Henley-Smith and the ASB under the Credit Contracts and Consumer Finance Act 2003 (CCCF Act 2003) arguing that the mortgage was linked to an alleged buy back transaction.

They also claimed that the ASB mortgage should be set aside on the basis of Land Transfer Act fraud as Mark Henley-Smith, in the course of acting for the trustees as mortgagors, acquired knowledge regarding the circumstances in which title to the property had been acquired, and this knowledge ought to be imputed to ASB.

In all three decisions concerning the ASB, the courts held that the ASB was a bona fide mortgagee.

Limitation and compensation

The Registrar-General opposed the Burmeisters' claim for compensation for their loss as a consequence of the fraud.

Initially, he claimed that the limitation period had expired. When that claim was unsuccessful, he argued that because of the Burmeisters' actions of carelessness, they would not succeed on a non est factum plea and, as a result, were not barred by the Act from bringing an action for recovery. Again, the Registrar-General was unsuccessful. The measure of damages was assessed as the loss of the value of the land at the time of deprivation together with interest at the rate of 5% from that date to the date of the hearing. This article submits that that assessment was incorrect.¹³

What was the end result?

Until 7 April 2015, the Burmeisters faced an impossible challenge to keep 1 Lotus Avenue. The trustees had been found guilty of fraud, the ASB was a bona fide mortgagee, the Burmeisters were in time (just) to bring a claim for compensation and the state's liability for compensation to the Burmeisters was assessed at \$349,374.98.

As at 26 August 2014 (the date of the latest decision), the court estimated that the value of the Burmeisters' property was approximately \$420,000.00, and the amount owed to the ASB was approximately \$641,000.00,¹⁴ \$349,374.98¹⁵ of which was considered the state's responsibility. As at that date, to prevent losing their home, the Burmeisters needed \$291,625.02.

The title

The relevant interests on the title to 1 Lotus Avenue (that was purchased by the Burmeisters in 1990) give the reader a first glimpse of an intriguing path of what essentially is a classic Torrens tale.

¹³ See below at 'The measure of damages'.

¹⁴ *Burmeister v Registrar-General of Land* [2014] NZHC 2033; (2014) 15 NZCPR 871 at [5].

¹⁵ This article suggests that that is the incorrect amount.

They comprise:

- 14.11.2001 at 9.00 am: Discharge of Mortgage B036075.2
- 14.11.2001 at 9.00 am: Transfer (5107414.2) to John Leslie O'Brien, Gillian Sandra O'Brien and Patricia Elizabeth Patterson
- 14.11.2001 at 9.00 am: Mortgage (5107414.3) to ASB Bank Ltd
- 13.6.2003 at 9.00 am: Caveat (5622121.1) by Ken Sidney Burmeister and Valerie Joan Burmeister
- 30.3.2015 at 7.00 am: Court Order (10015570.1) vesting the within land in Kenneth¹⁶ Sydney Burmeister and Valerie Joan Burmeister
- 7.4.2015 at 1.27 pm: Withdrawal of Caveat 5622121.1
- 7.4.2015 at 1.27 pm: Discharge of Mortgage 5107414.3

The caveat, the much-delayed return of the title to the Burmeisters, and the final discharge of the mortgage

Little is said by the courts concerning the Burmeisters' caveat that was lodged on 13 June 2003,¹⁷ just under 2 months after they learnt of the O'Briens' scam.

Unsurprisingly, it protected a beneficial interest in 1 Lotus Avenue as cestui que trust of which the registered proprietors John Leslie O'Brien, Gillian Sandra O'Brien and Patricia Elizabeth Patterson were trustees.

On 26 January 2005 the Burmeisters filed an originating application for an order that the caveat not lapse.¹⁸ This followed a request by the respondents, the above-named trustees, on 14 January 2005 to the Burmeisters to vacate the property within 42 days on the ground that they, the respondents, intended to sell the property to a third party. An order that the caveat not lapse was given by the court on 9 February 2005.¹⁹

The O'Briens were found guilty of fraud on 1 December 2009. Their names remained on the title for a further 5¼ years (until 30 March 2015), albeit encumbered by Burmeisters' caveat. The possible reason for this is found in Asher J's following comment in the substantive fraud decision (1 December 2009):

I consider that the correct conceptual approach is to regard the fraudulent purchasers, here the O'Briens, to be the constructive trustees with an immediate obligation to transfer the property back to the original registered proprietor, the Burmeisters: *Gordon v Treadwell Stacey Smith*.²⁰

¹⁶ This seems to be an inconsequential change of the first name.

¹⁷ There is a rather odd paragraph in *Burmeister v O'Brien* [2010] 2 NZLR 395, (2011) 12 NZCPR 9 at [30] in which the court states:

On 10 February 2004, the Burmeisters had served on them a s 92 notice under the Property Law Act 1952 [now repealed] by the Auckland Savings Bank Limited ('the ASB') as mortgagee of Lotus Avenue. This was in respect of a mortgage from the O'Brien Trust to the ASB. Through 2004 there were proceedings between the ASB and the O'Brien Trust and Geoffrey Clayton. The ASB obtained summary judgment against the O'Brien Trust. The O'Briens placed a caveat against the property.

(The writer assumes mistaken identity of the parties).

¹⁸ The application was made pursuant to s 145 of the Land Transfer Act 1952: 'Lapse of caveat against dealings'.

¹⁹ *Burmeister v O'Brien* (unreported, HC Tauranga, CIV 2005-470-48, 9 February 2005).

²⁰ *Gordon v Treadwell Stacey Smith* [1996] 3 NZLR 281 at 289, where the Court of Appeal made the following comment:

If it were not for the existence of the ASB mortgage, which has already been found to be a genuine mortgage properly registered and enforceable by the ASB, I would order that the title be rectified to record the Burmeisters as registered proprietors. However, the ASB has a mortgage and I will return to this topic at the end of the judgment.²¹

At the end of the judgment, the Judge states:

It is not possible to make orders at this point. Further submissions and possibly further evidence is required. Critical to the issue will be the amount that is owed to the ASB and the ASB's position in relation to the Burmeisters. The particular issue to be addressed will be whether, if the Burmeisters are not able to recover Lotus Avenue, their damages should be limited to the value of Lotus Avenue, and not the full amount owed to the ASB. More minor issues are who paid the rates, the amount paid, and the amount received by the Burmeisters from ICMG.²²

With respect, this approach is incorrect. It circumvents the basic principles of the Torrens system. The O'Briens were found guilty of fraud. Their registered interest should have been cancelled (they no longer had indefeasibility of title or protection from ejectment)²³ and the Burmeisters, having removed their caveat, should have been reinstated as registered proprietors, albeit as mortgagors.

The question of state compensation for the mortgage follows the event. It is an issue involving the state and the Burmeisters. It concerns neither the ASB directly (the compensation is paid to the Burmeisters, not the mortgagee) nor the fraudulent O'Briens. The minor issues to which the court referred (and which were eventually dismissed)²⁴ should not have impacted on the court's recognition of this fundamental tenet of the Torrens system of registration.

A simple exemplar is given in the High Court decision in *Waller v Davies*,²⁵ in which the new registered proprietors were held to be fraudulent but the subsequent mortgagee bona fide.

Harrison J, having dismissed an application for an order directing the Registrar of Lands to cancel the mortgages, indicated that he was prepared to consider an amended application for relief and continued:

It may most appropriately be restricted to a direction to the Registrar to set aside all transfers to CH Finance, and restore the original owners to the titles but subject of course to the mortgagees' first securities (*Heron v Broadbent* (1919) 20 SR(NSW) 101).

In the present case there was no reasonable basis supporting a claim on the part of the Cancians (original caveators) to an interest in Burke Grove. The transfer in Ms Gordon's favour had long since been registered and, pursuant to s 41 of the Land Transfer Act, the legal estate had passed to her. It was not arguable that any equitable interest remained behind with the Cancians as might have been the case if, for instance, they had been persuaded to part with the land by a fraud and consequently the transferee took it subject to a constructive trust in favour of the vendor.

²¹ *Burmeister v O'Brien* [2010] 2 NZLR 395; (2011) 12 NZCPR 9 at [175].

²² *Ibid*, at [293].

²³ Sections 62, 63 and 183 of the Land Transfer Act 1952 — see below at 'The Torrens System of Registration of Title'.

²⁴ See *Burmeister v Registrar-General of Land* [2014] NZHC 2033; (2014) 15 NZCPR 871 at [33].

²⁵ *Waller v Davies* [2005] 3 NZLR 814; (2005) 6 NZCPR 341, overturned on appeal: *Waller v Davies* [2007] 2 NZLR 508; (2007) 8 NZCPR 1 (CA).

I assume that as a consequence of my conclusions all original owners will have a right to claim compensation under s 172(b) . . . The limit of their claims would be the amounts required to discharge a particular mortgage, less any sums actually paid by CH Finance (excluding deductions for fees etc). I add also what may be obvious: the existence of the mortgagees' estate bars the owners from bringing an action for recovery of their originally unencumbered interest.²⁶

The lack of precision in the Burmeisters' substantive proceedings led to a fundamental error as to their quantum of damages. In the damages proceedings in 2014, all parties (including the court) proceeded on the ground that the compensation was to be calculated on the value of the land (full deprivation) rather than the value of the mortgage (partial deprivation). As from 1 December 2009, the land belonged to the Burmeisters, not the O'Briens. In essence, the same Judge, in the final proceedings on 26 August 2014, determined the damages on the ground that the O'Briens still owned the land and therefore the Burmeisters were deprived of it. This is completely contrary to the Judge's comment in the substantive proceedings when determining the effect, if any, of the CCCF Act 2003:

. . . The Burmeisters' entitlement to get the property back will arise from the fraud practised on them and the constructive trust on which the property is held, not from any buy-back transaction.²⁷

Some blame could have been laid at the Burmeisters' feet for not applying to the court for a correction of title under s 85 of the LTA 1952 (NZ)²⁸ but the mere fact that they were able to do this is proof that they were not eligible for compensation for full deprivation of the land — quite simply, they were not barred by the LTA 1952 (NZ) from bringing an action for possession or other action for the recovery of their land.

This issue is discussed further below.²⁹

On 7 April 2015, after 9½ years of litigation, the ASB mortgage (that far exceeded the value of 1 Lotus Avenue) was discharged. As this article shows, the ASB fought long and expensive battles to prove its bona fide status. It therefore seems very unlikely that it (the only entity that could do so) forgave the outstanding monies — according to the courts, something in the realm of \$292,000 after the assessed state compensation was paid to the Burmeisters who could then use it to address some of the mortgage debt.

This is a long story that ends somewhat mysteriously.

The Torrens system of registration of title

The Torrens system of registration of title was designed to be simple and certain. Its principles are well expressed in an oft-cited historic decision:

to contain within its four corners a complete system which any intelligent man could understand, and which could be carried into effect in practice without the intervention of persons skilled in the law . . . The cardinal principle of the statute is that the register is everything, and that, except in cases of actual fraud on the part

26 *Waller v Davies* [2005] 3 NZLR 814; (2005) 6 NZCPR 341 at [166]–[167].

27 *Burmeister v O'Brien* [2010] 2 NZLR 395; (2011) 12 NZCPR 9 at [256].

28 See below at 'The Torrens System of registration of title'.

29 See below at 'The measure of damages'.

of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible interest against all the world . . .³⁰

The relevant legislative structure

These fundamental principles are enshrined in Torrens legislation — in New Zealand, the current Act is the LTA 1952 (NZ).³¹

Indefeasibility of title

62 Estate of registered proprietor paramount

Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which, but for this Act might be held to be paramount or to have priority but subject to the provisions of Part 1 of the Land Transfer Amendment Act 1963, the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in the case of fraud, hold the same subject to such encumbrances, liens, estates, or interests as may be notified on the folium of the register constituted by the grant or certificate of title of the land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever . . .³²

63 Registered proprietor protected against ejectment

- (1) No action for possession or other action for the recovery of any land, shall lie or be sustained against the registered proprietor under the provisions of this Act for the estate or interest in respect of which he is so registered, except in any of the following cases, that is to say:
 - (a) the case of a mortgagee as against a mortgagor in default:

...
 - (c) the case of a person deprived of any land by fraud, as against the person registered as proprietor of that land through fraud or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud:

...
- (4) In any case other than as aforesaid, the production of the register or of a certified copy thereof shall be held in every court of law or equity to be an absolute bar and estoppel to any such action against the registered proprietor or lessee of the land the subject of the action, any rule of law or equity to the contrary notwithstanding.

183 No liability on bona fide purchaser or mortgagee

30 *Fels v Knowles* (1906) 26 NZLR 604 at 609 per Edwards J. This goal has been reiterated in many subsequent NZ decisions including *Waimaha Sawmilling Co Ltd (in liq) v Waione Timber Co Ltd* [1926] AC 101; *Boyd v Mayor of Wellington* [1924] NZLR 1174; *Frazer v Walker* [1967] NZLR 1069 (PC); *Housing Corporation v Maori Trustee* [1988] 2 NZLR 662; *Morrison v Bank of New Zealand* [1991] 3 NZLR 291; *CN & NA Davies Ltd v Loughton* [1997] 3 NZLR 705; *Waller v Davies* [2007] 2 NZLR 508 (CA); *Regal Castings Ltd v Lightbody* [2009] 2 NZLR 433 (SC).

31 Comparative (but by no means identical) Australian statutory provisions with respect to paramountcy comprise: Land Titles Act 1925 (ACT) s 58; Real Property Act 1900 (NSW) s 42 (1); Land Title Act (NT) ss 188, 189; Land Title Act 1994 (Qld) s 184; Real Property Act 1886 (SA) s 69; Land Titles Act 1980 (Tas) s 40; Transfer of Land Act 1958 (Vic) s 42 (1); Transfer of Land Act 1893 (WA) s 68.

32 The three exceptions are not relevant in this context.

- (1) Nothing in this Act or the Land Transfer (Computer Registers and Electronic Lodgement) Act 2002 shall be so interpreted as to render subject to action for recovery of damages, or for possession, or to deprivation of the estate or interest in respect of which he is registered as proprietor, any purchaser or mortgagee bona fide for valuable consideration of land under the provisions of this Act or the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002 on the ground that his vendor or mortgagor may have been registered as proprietor through fraud or error, or under any void or voidable instrument, or may have derived from or through a person registered as proprietor through fraud or error, or under any void or voidable instrument, and this whether the fraud or error consists in wrong description of the boundaries or of the parcels of any land, or otherwise howsoever.

...

Compensation

172 Compensation for mistake or misfeasance of Registrar³³

Any person —

...

- (b) Who is deprived of any land, or of any estate or interest in land, through the bringing of the land under the Land Transfer Acts, or by the registration of any other person as proprietor of that land, or by any error, omission, or misdescription in any certificate of title, or in any entry or memorial in the register, or has sustained any loss or damage by the wrongful inclusion of land in any certificate as aforesaid, and who by this Act is barred from bringing an action for possession or other action for the recovery of that land, estate or interest —

may bring an action against the Crown for recovery of damages.

179 Measure of damages

No person shall, as against the Crown, be entitled to recover any greater amount for compensation in respect of the loss or deprivation of any land, or any estate or interest therein, than the value of that land, estate or interest at the time of deprivation, together with the value of the messuages and tenements erected thereon and improvements made thereto (if any) prior to the time of deprivation, with interest at the rate of 5 per cent per annum to the date of judgment recovered.

Limitation

180 Limitation of actions³⁴

- (1) No action for recovery of damages as aforesaid shall lie or be sustained against the Crown unless the action is commenced within the period of 6 years from the date when the right to bring the action accrued; but any person being under the disability of infancy or unsoundness of mind may bring such an action within 3 years from the date on which the disability ceased.

³³ For a full discussion of Australian statutory provisions with respect to compensation, see Bradbrook, McCallum and Moore, *Australian Real Property Law*, 6th ed, 2015 at [4.435]-[4.460].

³⁴ For a full discussion of Australian statutory provisions with respect to limitation of actions, see Bradbrook, McCallum and Moore, *Australian Real Property Law*, 6th ed, 2015 at [4.480]

- (2) For the purposes of this section, the date when the right to bring an action accrued shall be deemed to be the date on which the plaintiff becomes aware, or but for his own default might have become aware, of the existence of his right to make a claim.

Correction of title by order of Court³⁵

85 Court may order former certificate of title to be cancelled

Upon the recovery of any land, estate, or interest by any proceeding in any court from the person registered as proprietor thereof, the court may, in any case in which such a proceeding is not expressly barred, direct the Registrar to cancel any certificate of title or other instrument, or any entry or memorial in the register relating to the land, and to substitute such certificate of title or entry as the circumstances of the case require, and the Registrar shall give effect to the order accordingly.³⁶

The importance of risk analyses

The Burmeisters owned an unencumbered property that was transferred to the O'Briens as trustees of the O'Brien Trust.

Unless the O'Briens had acted fraudulently (ss 62, 63 and 183 of the LTA 1952 (NZ)) they had an indefeasible title. The property was theirs, they would be responsible for the ASB mortgage and the Burmeisters, having not been deprived of anything, would not be eligible for any compensation.

If, on the other hand, the O'Briens had acted fraudulently, their registered interest would be cancelled and the property returned to the Burmeisters. Again, as there is no complete deprivation for the Burmeisters (they are not barred by the Act from bringing an action for recovery), no compensation for the value of the land is available.

Should the Burmeisters prove fraud, they then must challenge the ASB's position.

If the ASB had also acted fraudulently, its registered interest would be cancelled.

Alternatively, if the ASB was held to be a bona fide mortgagee, its interest would attach to the Lotus Avenue title, back under the ownership of the Burmeisters.

If the latter situation applies, the Burmeisters, having lost their case against the ASB, would be eligible for compensation that would, supposedly, enable them to discharge the mortgage (subject to any compensation cap or limitation issue).

³⁵ For a full discussion of Australian statutory provisions with respect to correction of title, see Bradbrook, McCallum and Moore, *Australian Real Property Law*, 6th ed, 2015 at [4.395]-[4.415]

³⁶ There are instances where the court has made such a direction despite the Registrar-General not being represented: see, for instance, *Nathan v Dollars & Sense Finance Ltd* [2006] 1 NZLR 490; (2005) 5 NZ ConvC 194,205 (this order remained unchanged as a result of unsuccessful appeals); *Barge v Freeport Development Ltd (No 2)* (2006) 7 NZCPR 414 at [19]. Unless he did so under the controversial s 81 of the Land Transfer Act 1952 (NZ) (a provision strongly criticised as it confers powers more extensive than those of the courts), the Registrar-General himself would not correct the title in these circumstances. The exercise of the Registrar-General's powers under ss 80 and 81 of the Act has not been regarded by the courts as appropriate for full-scale trial proceedings.

Adopting a fiscal approach: The risk analysis model

This article examines why the Burmeisters became embroiled in almost a decade of litigation. Its purpose is to signal to litigators an alternative approach that focuses primarily on a simple economic model against which they could assess the risk of prolonged litigation that could result in potentially disastrous results for the claimant.

This article identifies the importance of conducting fiscal risk assessments at various stages of the proceedings.

The stages comprise:

- The start: which parties should be joined initially?
- When should a party accept a Court ruling and simply move on?
- What compensation is the plaintiff eligible for and what is the cap?
- What is the time limitation for making a compensation claim?
- What role should the Registrar-General take?

Which parties should be joined initially?

In the Burmeister scenario, seven parties were joined initially. The seventh defendant was the ASB.

The Burmeisters saw every reason to join the ASB into the proceedings. They contended that the ASB mortgage was linked to an alleged buy-back arrangement under the CCCF Act 2003. This argument involved two factors:

- (i) Was there a buy-back arrangement between the Burmeisters and the O'Briens?
- (ii) If so, could the ASB be linked to it, by way of a security interest taken in connection with it.

It is also understandable that the Burmeisters assumed that the litigation would address these two questions in sequence.

Worst case scenarios should always be part of a best practice assessment for impending litigation. In terms of choosing the initial defendants, the risk of a reversal of the normal sequence is always a possibility. And indeed that is what happened: once joined, the ASB promptly applied to be struck out. The narrative below demonstrates the potential fallout.

This article urges that careful thought be given to exactly which parties should be joined initially. Should the ASB have been left out at this stage? In terms of litigation strategy, a litigator might include the mortgagee anticipating some gain from an out-of-court settlement but, as this article attests, joining the mortgagee initially is something of a gamble.

Notably (and this engendered considerable discussion in the limitation/compensation proceedings) the Registrar-General was not joined initially.

The ASB's strike out action immediately created a problem. The courts consistently had to deal with a 'straw man' scenario. In deciding the fate of the ASB, they first had to assume that there was a buy-back arrangement under the CCCF Act 2003 Act and that, under the provisions of that Act, the ASB was drawn into it; and second, in order to implicate Mark Henley-Smith, that

the Burmeisters had been fraudulent.³⁷

In the decisions concerning the ASB, the Judges were focused on whether the ASB mortgage was a security interest that could be linked to the buy-back transaction. Without much ado, they accepted that there was a buy-back arrangement and their conclusions were based on this assumption. However, in the substantive proceedings where, *inter alia*, the O'Briens were found fraudulent, the CCCF Act 2003 was revisited and Asher J concluded that there had been no buy-back transaction, thus absolving the ASB of any possible linked transaction.

The Burmeisters also argued that the alleged fraud of Mark Henley-Smith, as agent for the ASB, could be visited on the bank. On this issue, the courts again had to make the assumption that the O'Briens had been fraudulent (until 2009, an unproven fact). While the notion of an agent's fraud being visited down to the mortgagee was quite easily dismissed in the first of the three decisions, the then intervening decision of *Dollars & Sense Finance Ltd v Nathan*³⁸ (an unfortunate co-incidence) led to two further protracted hearings.

The perils of an initial confrontation with the ASB, instead of the O'Briens, were real. In the circumstances, it might have been wise if only the O'Briens and associated parties should have been joined initially. Deciding their fate first would have resulted in a much more precise action against the ASB. The prolonged arguments that the ASB was linked to a buy-back transaction would have fallen away.

When should a party accept a court ruling and simply move on?

The lengthy litigation is described below. This article identifies several stages where there was room to pause and assess the risks of embarking on a review or an appeal in pursuit of proving their claim, irrespective of (in each case) very limited prospects of success.

The article points out where such analyses should have been made, and uses as its axis the table below.

What compensation is the plaintiff eligible for and what is the cap?

The Burmeisters lodged a caveat on 1 Lotus Avenue on 13 June 2003 that protected their beneficial interest as *cestui que trust*. This was successfully defended against the O'Briens in early 2005, sound proof that the caveat was holding their interest.³⁹ If the Burmeisters were successful in their fraud

³⁷ There was no guarantee that this would be the case. An unrelated case in courts at the time — *Waller v Davies* [2007] 2 NZLR 508; (2007) 8 NZCPR 1 (CA), overturning the lower court on the issue of fraud (*Waller v Davies* [2005] 3 NZLR 814; (2005) 6 NZCPR 341) — in a very broad sense mirrored the Burmeister scenario. While the appeal turned on an error in the High Court finding that there had been fraudulent misrepresentation when this, in fact, had not been pleaded, the Court of Appeal considered that the general pattern of the evidence was of the homeowners' failure to understand the effect of documents they signed rather than a case of misrepresentation.

³⁸ *Dollars & Sense Finance Ltd v Nathan* [2008] 2 NZLR 557; (2008) 9 NZCPR 116 (SC).

³⁹ This is subject, of course, to errors or mistakes made by the Registrar-General or his or her officers. See, for instance, *Marriott v Attorney-General* [2011] 1 NZLR354; (2010) 11 NZCPR 737, a case in which the Registrar-General through an employee of LINZ omitted to notify a caveator that an application for lapse of a caveat had been made, and then mistakenly treated the application to lapse as a withdrawal of the caveat which claimed as

allegations against the O'Briens, 1 Lotus Avenue would be returned to them and a compensation claim for the value of the land would not apply:

one of the policies behind the Assurance Fund's provisions [is that] where the land can be recovered from wrongdoers, the question of compensation should be irrelevant.⁴⁰

If the Burmeisters were unsuccessful, again any compensation would be irrelevant — the O'Briens would have been the rightful owners of the property.

The other danger of losing their land would be if the mortgagee, the ASB, exercised its power of sale and sold to a bona fide third party. It is clear that default on the mortgage began relatively quickly. Indeed, in 2004, the ASB took proceedings⁴¹ for default. However, were the ASB to action a mortgagee sale, it could not have avoided the Burmeisters' caveat⁴² and would have had to apply to the court for its removal⁴³ or its lapsing.⁴⁴ The substantial hearing would have addressed whether or not the O'Briens had been fraudulent (and this may well have led to a much speedier resolution). So, again, the Burmeisters' caveat would have held their interest if they had one, and compensation for the loss of their land would be irrelevant. Therefore, throughout the proceedings, the Burmeisters were not in danger of permanently losing their land unless the O'Briens were considered bona fide purchasers. Either way, as noted above, compensation for full loss of their land was irrelevant.⁴⁵

The only compensation for which the Burmeisters would be eligible would be for their deprivation of an estate or interest in their land — the loss of their *unencumbered* interest as a result of the O'Briens' fraud and the ASB's innocence.⁴⁶ There is also the theory that this partial deprivation is possibly

its interest a constructive trust with the caveator as the beneficiary. The withdrawal of the caveat enabled the registered proprietor (a company which was allegedly part of a buy-back agreement) to sell the property to a third party.

40 New South Wales Law Reform Commission Report 76, *Torrens Title: Compensation for Loss*, 1996, at 3.6.

41 See above n 17.

42 See s 141 (3) and (4) of the LTA 1952 (NZ). The only time a registered mortgagee of, say, mortgage 'S' can ignore a caveat on the title is if the caveat was lodged after the registration of mortgage 'S' and the estate or interest claimed by the caveator arises under an unregistered mortgage or an agreement to mortgage, dated later than the date of registration of the mortgage 'S' and relating to the same estate or interest to which mortgage 'S' relates.

43 Section 143 of the LTA 1952 (NZ): 'Procedure for removal of caveat'.

44 Section 145A of the LTA 1952 (NZ): 'Early lapse of caveat against dealings'.

45 There are instances where plaintiffs who have been temporarily deprived of their land have claimed damages under the deprivation and loss provisions but those cases relate to events such as loss of a chance to sell the property (see, for instance, *Glensburgh Pty Ltd v Registrar-General* (2001) 10 BPR 19,311; [2001] NSWSC 1114; BC200107588 at [57]) or loss of rents and profits during the period of deprivation (see, for instance, *Parker v Registrar-General* [1977] 1 NSWLR 22 at 28). These examples are outside the Burmeister scenario.

46 See, for instance, *Heron v Broadbent* (1919) 20 SR (NSW) 101; *Waller v Davies* [2005] 3 NZLR 814; (2005) 6 NZCPR 34; *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611; 7 ALR 383; 50 ALJR 4; BC7500057; *Parker v Registrar-General* [1977] 1 NSWLR 22.

not deprivation at all but rather loss, also an essential component of s 172(b) of the LTA 1952 (NZ).⁴⁷

A very wise — and simple — risk analysis process at the start of the campaign is to tabulate what that compensation might be on a year to year basis and to track it, as much as one could, against an accelerating defaulting mortgage.

In the Burmeisters' case, the following model would have been a useful guide. Due to privacy and confidentiality issues, the writer cannot guarantee total accuracy for the mortgage default column. Indeed, neither could a litigator in his or her preliminary assessment. The only advantage the writer has is the knowledge of the final amount.

The following caveats apply:

- The mortgage default is based on an assumed flat penalty interest rate of 12.3%, starting in late November 2003, an approximate date (taken from the evidence) as to when the mortgage began to run into trouble. Over the decade the rates may have fluctuated (more recently, probably lessened) but that would not have been ascertainable when the litigation commenced.
- There is no assessment of mortgagee costs. There is very little evidence in the decisions as to what these might have been but it is clear that the Burmeisters were legally aided throughout and this would have had considerable impact.
- The compensation is assessed on the principle that the measure of damages is the amount of the mortgage with costs provided that sum does not exceed the value of the land itself at the time of deprivation (discussed below).
- Apart from the final accounting in the last decision, there are only three times where the courts give pointers as to the amount of the accelerating mortgage. These are inconsistent so have not been factored in.⁴⁸

⁴⁷ See *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618; 7 ALR 383; 50 ALJR 4; BC7500057. In the writer's view, it is more accurate to regard the Burmeisters' situation as a loss rather than a deprivation. See also n 122 below.

⁴⁸ See, for instance, two references where the courts assessed the value of the ASB mortgage at 'over \$500,000.00': *Burmeister O'Brien* [2010] 2 NZLR 395; (2011) 12 NZCPR 9 at [47]; *Registrar-General of Land v Burmeister* [2012] NZCA 340; (2012) 13 NZCPR 504 at [15].

A monetary guide

Date	\$172,000 (Initial Mortgage) and approximated default accelerations: 12.3%	\$172,000 (Mortgage +) capped at value of land at the date of deprivation ⁴⁹
14 November 2001	\$172,000.00	\$172,000.00
14 November 2002	\$172,000.00	\$172,000.00
14 November 2003	\$172,000.00 (after which default is assumed)	\$172,000.00
14 November 2004	\$194,390.37	\$194,390.37
14 November 2005	\$219,695.45	\$215,000.00
14 November 2006	\$248,294.66	
14 November 2007	\$280,616.81	
14 November 2008	\$317,146.55	
14 November 2009	\$358,431.61	
14 November 2010	\$405,091.02	
14 November 2011	\$457,824.39	
14 November 2012	\$517,422.41	
14 November 2013	\$584,778.69	
26 August 2014	\$641,000.00	
BALANCE (after compensation)		\$426,000.00

The succeeding risk analyses are based on this table.

The ringing alarm bells

The very real risk to the Burmeisters was that the longer the proceedings took, the wider the gap became between the accelerating mortgage and the available compensation. It is only when that gap becomes unmanageable that the Burmeisters (once reinstated owners but also mortgagors) would be in danger of losing their land as a result of the ASB exercising its power of sale against them.

What is the compensation cap?

The compensation relates to the mortgage which was registered on 14 November 2011. It was \$172,000.00.

In the case of partial deprivation caused by the registration of an indefeasible mortgage against the registered proprietor's title, the measure of damages will be the amount required to repay the mortgage with costs provided that sum does not exceed the value of the land itself at the time of deprivation.⁵⁰

⁴⁹ See discussion below.

⁵⁰ *Heron v Broadbent* (1919) 20 SR (NSW) 101.

The courts attest that the value of the land at the time of deprivation was \$215,000.00. Therefore, according to the table above, the Burmeisters reached their state compensation limit shortly before 14 November 2005.

The Burmeisters lose ground (rapidly) any time after that date.

What is the time limitation for making a compensation claim?

Under s 180(2) of the LTA 1952 (NZ), the date when the right to bring an action is deemed to accrue is the date on which the plaintiff becomes aware, or but for his own default might have become aware, of the existence of his right to make a claim.

An initial risk analysis on this ground could involve a number of dates, but erring on the side of caution, a litigator would take particular notice of the earliest two that would be relevant:⁵¹

- August/September 2002 — when Mr Burmeister approached LINZ for a search of his title, and discovered that the property had been transferred to the trustees of the O'Brien Trust but apparently was not informed of the ASB mortgage.
- 14 April 2003 — when the Burmeisters read an article published in the *Sunday Star Times* on 13 April 2003 describing the scam.

Therefore, for an August/September 2002 start, the end date is August/September 2008. For a 14 April 2003 start, the end date is 14 April 2009.

The theory behind both these dates is investigated later, but, with very little judicial precedent to follow, there is wisdom in adopting a low risk strategy when determining a likely 6 year starting point at these dates, and diary them accordingly.

What role does the Registrar-General have?

There is considerable debate about the policy rationale that access to a compensation fund should be approached on the basis that it is to benefit those affected.⁵² The court's comment in *Solak v Registrar of Titles* is apposite:

The registrar appears to have forgotten that he is administering a beneficial fund. The purpose of the fund is not to accumulate money but to provide compensation to persons who are deprived of an interest in land by the operation of the indefeasibility provisions. The Registrar's primary role is to ensure that persons who are entitled to compensation receive it. The responsibility to protect the fund from unmeritorious claims is not paramount.⁵³

⁵¹ Given that s 180(2) of the LTA 1952 (NZ) constitutes a statutory recognition of the principle of reasonable discoverability, the date of 14 November 2001 could be discounted safely.

⁵² See, for instance, Low and Griggs, above n 7.

⁵³ (2011) 33 VR 40; [2011] VSCA 279 at [88] as cited by Low and Griggs, above n 7, at 21. Although it does not affect the comment above, the decision in *Solak* (which involved the threshold issue of an 'all moneys' mortgage that does not contain a covenant to pay any particular amount and whether the mortgage secures nothing because the loan agreements are forged and therefore void) has been criticised severely. See for instance, comments of the Supreme Court of Victoria in *Perpetual Trustees Victoria Ltd v Xiao Hui Ying* [2015] VSC 21; BC201500305 at [97]–[99].

Nonetheless, proceedings against the Crown have often been ‘defended in an adversarial manner, with the registrar pleading all available defences’.⁵⁴

The ASB — A ticking time bomb?

The Burmeisters commenced proceedings on 20 October 2005. It took over 4 years before the Burmeisters received a decision that confirmed that the O’Briens had been guilty of fraud. The Burmeisters spent those intervening years in litigation with the ASB. The table above indicates the risk of prolonged litigation with a mortgagee before actual fraud proceedings are heard. However, if the mortgagee is joined, then there must be a risk analysis made as to when it is appropriate to accept a court ruling and simply move on. In the first proceedings against the ASB, the Associate Judge made it very clear that there was little strength in the Burmeisters’ allegations. The Burmeisters should have resisted any temptation to challenge the decision in favour of the bank.

The mortgage proceedings

The first ASB decision

In *Burmeister v O’Brien*,⁵⁵ the Burmeisters alleged that the ASB mortgage, under the CCCFA 2003 was a security interest taken in connection with an alleged buy-back transaction between the Burmeisters and the O’Briens. As such, it was part of that buy-back transaction for the purposes of re-opening oppressive contracts. The Burmeisters sought an order (pursuant to s 127(2) of the CCCF Act 2003) that the ASB mortgage be set aside.

A ‘security interest’ is defined in s 5 of the CCCFA 2003⁵⁶ as:

an interest in property created or provided for by a transaction that, in substance, secures payment or performance of an obligation under a credit contract, consumer lease, or buy-back transaction, without regard to —

- (a) the form of the transaction; and
- (b) the identity of the person who has title to the property that is subject to the security.

Section 119(1) of the CCCFA 2003⁵⁷ states:

119 Collateral contracts and linked transactions

- (1) If a security interest is or may be taken in connection with a credit contract, consumer lease, or buy-back transaction, the contract or arrangement that creates or provides for the security interest is to be treated as forming part of the credit contract, lease, or transaction for the purposes of this Part [‘Reopening of oppressive credit contracts, consumer leases and buy-back transactions’].

⁵⁴ See O’Connor, above n 3, at 162–3.

⁵⁵ *Burmeister v O’Brien* (2006) 7 NZCPR 440 (HC).

⁵⁶ This definition was amended by s 6 of the Credit Contracts and Consumer Finance Amendment Act 2014 — the words ‘consumer lease’ were deleted.

⁵⁷ Section 119(1) was amended by s 73 of the Credit Contracts and Consumer Finance Amendment Act 2014 — after the words ‘security interest’ in each instance, the words ‘or guarantee’ were inserted.

Associate Judge Abbott accepted that the transaction between the Burmeisters and the O'Briens was a buy-back arrangement.

However, he noted that it was clear from the s 5 definition that the security interest which the Act seeks to capture must be determined by reference to the transaction which creates it, and the relationship between the transaction and the buy-back transaction.⁵⁸ In this instance, the ASB mortgage arose under a loan agreement between the O'Brien Trust and the bank. The mortgage secured nothing more than a repayment of the advance made under the agreement. In order to come under the s 119 provision, there had to be a sufficient connection between the loan transaction and the buy-back transaction and this could only have happened if ASB had been a participant in some form in the buy-back transaction. The court held that there had been no such participation — ASB had no knowledge of the buy-back transaction and had no direct knowledge of or dealings with the Burmeisters. The Judge also noted that, pursuant to s 182 of the LTA 1952 (NZ),⁵⁹ the bank had no duty to enquire into the circumstances by which the trustees came to be purchasing 1 Lotus Avenue, or to see to the application of the money it advanced.

While this finding provided ASB with a complete defence to the Burmeisters' claim, the Associate Judge addressed the other two grounds upon which ASB claimed that the Burmeisters could not succeed.

He did not accept the Burmeisters' argument that the CCCF Act 2003 impliedly overruled the interest of a bona fide purchaser for value. In his words: 'That is such a long-standing principle, it could only be overridden by express words'.⁶⁰

Nor, citing with approval a number of well-known decisions at the time,⁶¹ did the Associate Judge accept that fraud could be imputed to the ASB through the knowledge of its agent, Mark Henley-Smith.

He found no obligation or rule of law to support this.

The Associate Judge's parting advice; and risk analysis

Despite his conclusions above, Associate Judge Abbott queried as to whether he should nevertheless regard ASB as a necessary party to the proceedings on the basis that it would necessarily be affected by any order the court might ultimately make under the CCCFA 2003. He concluded that he should not and, in doing so, emphasised the Torrens path: 'Any transfer back to Mr and Mrs Burmeister can be made subject to the ASB mortgage'.⁶²

This was the cue for the Burmeisters to accept the position of the ASB.

⁵⁸ *Burmeister v O'Brien* (2006) 7 NZCPR 440 (HC) at [40].

⁵⁹ Section 182 of the LTA 1952 (NZ): 'Purchaser from registered proprietor not affected by notice'.

⁶⁰ (2006) 7 NZCPR 440 (HC) at [52].

⁶¹ *Barclays Bank plc v Thomson* [1997] 4 All ER 816; *Royal Bank of Scotland v Etridge (No 2)* [2001] 4 All ER 449; *Kennedy v Green* (1834) 3 MY & K 699; *McCord v Afele & Westpac Banking Corporation* (HC, Ak, Salmon J, CIV 2003-404-426, 22 September 2003); *Waller v Davies* [2005] 3 NZLR 814; (2005) 6 NZCPR 341 (subsequently appealed *Waller v Davies* [2007] 2 NZLR 508; (2007) 8 NZCPR 1 — see above n 37). See however the subsequent decision of *Dollars & Sense Finance Ltd v Nathan* [2008] 2 NZLR 557; (2008) 9 NZCPR 116 (SC) described below.

⁶² *Burmeister v O'Brien* (2006) 7 NZCPR 440 (HC) at [68].

Fiscal/time risk analysis

The decision was delivered on 30 August 2006.

Accelerating mortgage:	\$242,000.00 (approx)
Available compensation:	\$215,000.00
Gap (deficit)	\$27,000.00
Limitation	
August/September 2008:	2 years left
14 April 2009:	2 years, 8 months left

The Burmeisters were already in deficit and time was beginning to run against them.

Intervening unrelated proceedings — fraud by an agent: *Dollars & Sense Finance Ltd v Nathan*

When the Judge's decision was delivered, results of unrelated appeal proceedings concerning Torrens fraud by an agent — *Dollars & Sense Finance Ltd v Nathan*⁶³ — were pending. Subsequently, the Supreme Court's decision (dismissing that appeal) was released on 8 April 2008.⁶⁴ It seems that these proceedings persuaded the Burmeisters to continue proceedings and ignore the running of time.

As *Dollars & Sense Finance Ltd v Nathan* is a seminal case on land transfer agency fraud it deserves some explanation.

Mr and Mrs Nathan (Snr) jointly owned a residential property. Their son, Rodney Nathan, needed to borrow \$250,000.00 for a business proposition. The lender, Dollars & Sense Finance Ltd (Dollars & Sense), required securities. The lender and Rodney agreed that one such security would be a property owned by Rodney's parents. The lender's solicitor, Mr Thomas, arranged delivery to Rodney of a package of documents for his parents to sign. Rodney procured his father's signature but forged that of his mother. He sent the unwitnessed documents back to Mr Thomas. Mr Thomas returned them to Rodney for witnessing. Rodney arranged for a female friend to complete the witness sections. The mortgage was duly registered under the LTA 1952 (NZ) and the net proceeds of the loan were disbursed.

When, approximately 3 years later, Rodney's company went into receivership, the lender sought to exercise its power of sale. Mr and Mrs Nathan challenged the lender's claim. Mr Nathan alleged he had been the victim of undue influence or unconscionable conduct but he died before the matter came to trial. His interest in the property was extinguished in favour of Mrs Nathan by way of survivorship. Mrs Nathan's separate defence was that Rodney's fraud (accepted as common ground) could be visited on the lender under the fraud exception to indefeasibility of title under the LTA 1952 (NZ), thus rendering the mortgage defeasible and able to be removed from the register.

Despite two appeals by Dollars & Sense, all three courts held that the mortgage should be extinguished on the ground of fraud.

63 *Dollars & Sense Finance Ltd v Nathan* [2007] 2 NZLR 747; (2007) 8 NZCPR 333 (CA) (William P Young dissenting).

64 *Dollars & Sense Finance Ltd v Nathan* [2008] 2 NZLR 557; (2008) 9 NZCPR 116 (SC).

In both the lower courts, fraud was established on the ground that Rodney was acting as the agent for the mortgagee and that fraud could be attributed to the mortgagee.⁶⁵

The Supreme Court⁶⁶ accepted these findings but then considered whether the forgery was an act done within the scope of the agency. If it was not, it could not be regarded as having been done for Dollars & Sense, and Dollars & Sense should not bear the responsibility for it. It considered that although the mortgagee (obviously) did not authorise the forgery, it did not follow that the forgery was outside the scope of the agency.

The court, while it agreed with Professor Peter Watt's argument⁶⁷ that there should be no 'fraud exception' to the imputation of knowledge, then observed:

in cases of the present time, that analysis is unnecessary for there is a much more fundamental reason for denying a 'fraud exception'. It is that *the liability of the principal is not dependent on imputation of the knowledge of the agent to the principal* but arises because the agent has done an act, namely the fraud, for which the principal is vicariously responsible.⁶⁸

The court noted the two stages of inquiry for vicarious liability that needed to be treated discretely:⁶⁹ first, what acts has the principal authorised; and, second, is the agent's act so connected with those acts that it can be regarded as a mode of performing them.

In the first stage, the acts that Dollars & Sense authorised were the obtaining of the signatures and the uplifting of the duplicate title and obtaining of the insurance details.

With respect to the second stage, the court identified two propositions:

- (i) The act can have the necessary close connection even though it is of criminal character and indeed done with fraudulent intent by the agent. The conduct need not have been authorised by the principal. The essential issue is whether the conduct of the agent fell within the scope of the task that the agent was engaged to perform.⁷⁰

65 *Nathan v Dollars & Sense Finance Ltd* [2006] 1 NZLR 490; (2005) 7 NZCPR 85 (HC); *Dollars & Sense Finance Ltd v Nathan* [2007] 2 NZLR 747; (2007) 8 NZCPR 333 (CA) (William P Young dissenting). In the High Court proceedings, Winklemann J also concluded that, in any event, Dollars & Sense had been wilfully blind to the possibility of fraud. While the majority of the Court in the Court of Appeal proceedings confirmed that Rodney's forgery should be attributable to Dollars & Sense, the whole court disagreed with the lower court's finding that the mortgagee had been wilfully blind to the possibility of Rodney's forgery. The majority considered that in any event the lack of proper attestation where the attestation is by or known about by an agent of a registered proprietor is sufficient to amount to Land Transfer Act fraud.

66 *Dollars & Sense Finance Ltd v Nathan* [2008] 2 NZLR 557; (2008) 9 NZCPR 557 (SC).

67 See P Watts, 'Imputed Knowledge in Agency Law: Excising the Fraud Exception' (2001) 117 *LQR* 300.

68 *Dollars & Sense Finance Ltd v Nathan* [2008] 2 NZLR 557; (2008) 9 NZCPR 557 (SC) at [44] (emphasis added).

69 The court cited as authority P S Atiyah, *Vicarious Liability in the Law of Torts*, Butterworths, 1967, p 178.

70 In support of this proposition the court cited a number of decisions. These included *Lister v Hesley Hall Ltd* [2002] 1 AC 215; [2001] 2 All ER 769; [2001] 2 WLR 1311; *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366; [2003] 1 All ER 97; [2002] 3 WLR 1913; *Hamlyn v John Houston & Co* [1903] 1 KB 81 (CA).

- (ii) A fraudulent act may be done within the scope of the agency, even if done exclusively for the benefit of the agent (and even more so when it is also done for the benefit of the principal).⁷¹

It established that there had been a 'close connection'.⁷² On this premise, the Supreme Court stated:

The true test is whether the tortious act has a sufficiently close connection with the task so that the commission of the tort can be regarded as the materialism of the risk inherent in that task. If that is so, what the agent did can fairly be treated as an improper mode of fulfilling the allocated task . . .⁷³

The court concluded that the forgery was committed in the course of Rodney's agency for Dollars & Sense and, as a result, Rodney's fraud rendered the registration of Dollars & Sense as mortgagee vulnerable. The mortgage was defeasible and required removal from the register.

The second ASB decision

Supposedly relying on the *Dollars & Sense* decisions,⁷⁴ the Burmeisters applied for a review of Associate Judge Abbott's decision.⁷⁵

They submitted that, although the ASB was a bona fide mortgagee, its mortgage was tainted by what they alleged was the fraudulent knowledge of its solicitor. Their counsel relied largely on the ground of imputation of knowledge as a means of establishing the fraud exception to indefeasibility. He also argued that the Associate Judge Abbott's analysis and application of the relevant provisions of the CCCF Act 2003 was wrong in law.

Stevens J was critical of the counsel's unsatisfactory pleadings against the ASB and was left to 'second guess' parts of the claim.⁷⁶

Noting that the Burmeisters had the burden of proof of persuading the High Court that Associate Judge Abbott's reasoning was wrong,⁷⁷ Stevens J dismissed the CCCFA 2003 grounds for review. Acknowledging Associate Judge Abbott's 'comprehensive and compelling'⁷⁸ reasoning, the Judge held that there was 'no pleading that, and nor did counsel for the Burmeisters suggest any basis upon which, the loan agreement or the ASB mortgage were to secure the performance of obligations in the buy-back transaction'.⁷⁹

71 The court cited the leading authority for this proposition: *Lloyd v Grace, Smith & Co* [1912] AC 716; [1911-13] All ER Rep 51; (1912) 28 TLR 547.

72 It agreed with the majority's view in the Court of Appeal proceedings in which Glazebrook J, delivering the judgment observed ([2007] 2 NZLR 747; (2007) 8 NZCPR 333 at [107]):

The critical fact is that the fraud took place to achieve the very thing that Rodney was asked to do as agent by Dollars & Sense, that is obtain a registrable mortgage. We thus consider that he was acting within his actual authority . . .

73 *Dollars & Sense Finance Ltd v Nathan* [2008] 2 NZLR 557; (2008) 9 NZCPR 116 (SC) at [44].

74 *Dollars & Sense Finance Ltd v Nathan* [2007] 2 NZLR 747; (2007) 8 NZCPR 333 (CA) (William P Young dissenting); *Dollars & Sense Finance Ltd v Nathan* [2008] 2 NZLR 557; (2008) 9 NZCPR 116 (SC).

75 *Burmeister v O'Brien* [2008] 3 NZLR 842; (2009) 9 NZBLC 102,415.

76 *Ibid*, at [19].

77 *Ibid*, at [29], citing with approval *Wilson v Neva Holdings Ltd* [1994] 1 NZLR 481.

78 *Ibid*, at [31].

79 *Ibid*, at [39].

In response to counsel's argument that the policy underlying the CCCFA 2003 should be given a broad interpretation that would favour the homeowner over an innocent financier, the Judge made the following prescient comment:

The CCCF does not result in a shift of rights to relief as between innocent parties. If the litigation brought by the Burmeisters [against the O'Briens] is successful, they could still recover their home, subject to the registered mortgage of the financier. They would also have rights to seek other relief against the perpetrators of the buy-back transaction, those who might have engaged in any fraud, *and to seek compensation under s 172 of the Land Transfer Act*.⁸⁰

Stevens J also upheld Associate Judge Abbott's finding that the CCCFA 2003 is not intended to override the interest of a bona fide mortgagee for value.

On the issue concerning the knowledge of an agent, the Judge observed that the claim against the ASB based on the fraud exception to indefeasibility:

could only succeed if any knowledge of [Mr Henley-Smith] could be imputed to the ASB on the basis of his role as common solicitor.⁸¹

With respect, following the Supreme Court's conclusion in *Dollars & Sense Finance Ltd v Nathan*⁸² any arguments about the 'mandate-confined rule of imputation', the 'fraud exception'⁸³ and any qualification of the same⁸⁴ are now misplaced in cases of Torrens agency fraud. The essential question is whether the agent has done an act, namely the fraud, for which the principal is vicariously liable.

However, Stevens J examined the Burmeisters' 'common solicitor' argument and concluded that:

given the limited mandate to [Mr Henley-Smith] by the ASB, any knowledge of [Mr Henley-Smith] gained when acting for the trustees of the O'Brien Family Trust should not be imputed to the ASB. I am satisfied that the qualification suggested by Professor Watts to the mandate-confined rule which would permit imputation [the common solicitor argument] does not apply to the particular circumstances of this case. This is consistent with the exclusion that Professor Watts himself contemplated where a common solicitor was exercising a ministerial function for one of his principals.⁸⁵

While this conclusion was made under the incorrect principle, the Judge's comments support the Supreme Court's finding in *Dollars & Sense Finance Ltd v Nathan* that (in order to establish vicarious liability) there must be a sufficiently close connection with the task so that the commission of the tort can be regarded as the materialism of the risk inherent in that task. If that is so, what the agent did can fairly be treated as an improper mode of fulfilling the allocated task.

⁸⁰ Ibid, at [39] (emphasis added).

⁸¹ Ibid, at [28].

⁸² *Dollars & Sense Finance Ltd v Nathan* [2008] 2 NZLR 557; (2008) 9 NZCPR 116 (SC) at [46].

⁸³ See Watts, above n 67.

⁸⁴ See P Watts, 'Imputed Knowledge in Agency Law — Knowledge Acquired Outside Mandate' [2005] NZ Law Rev 307.

⁸⁵ *Burmeister v O'Brien* [2008] 3 NZLR 842; (2009) 9 NZBLC 102,415 at [85].

In these proceedings, that was not the case. Stevens J observed⁸⁶ that all of the negotiations and discussions with the trustees as to the terms of the loan took place between an officer of the ASB and a trustee representative of the O'Brien Trust. Mr Henley-Smith played no part in the discussions. The mandate of Mr Henley-Smith for the ASB was to complete and attend to execution of the loan agreement and the mortgage. There were clear instructions about not altering or adding to the loan agreement or printed form of mortgage without reference to the ASB. Stevens J agreed with Associate Judge Abbott's description of Mr Henley-Smith's role as 'ministerial'.

This is a vast contrast to the circumstances in the Dollars & Sense litigation where:

... Dollars & Sense is benefiting from the fraud its own agent and when, as financier, it failed to take even the most elementary precautions against sharp dealing.⁸⁷

The Burmeisters' application for review was dismissed on 2 September 2008.

Fiscal/time risk analysis

On 2 September 2008, the figures were:

Accelerating mortgage:	\$310,297.00 (approx)
Available compensation:	\$215,000.00
Gap (deficit)	\$95,297.00
Limitation	
August/September 2008:	either out of time or very close
14 April 2009:	approximately 8½ months left

The third ASB decision

Little heed was being paid to the worrying situation. The Burmeisters filed an application for leave to appeal to the Court of Appeal against Stevens J's decision.⁸⁸

Two grounds were advanced: the first, relating to the agent's fraud, comprised seven sub-grounds; the second, relating to the CCCFA 2003 comprised two sub-grounds. Inter alia, their counsel submitted that the legal issues to be tested were of sufficient public interest and of sufficient importance to outweigh the cost and delay of a further appeal.

In his submission that the application should fail, counsel for the ASB, pointing out deficiencies in the Burmeisters' application (particularly the claim that the Supreme Court's decision in *Dollars & Sense Finance Ltd v Nathan* left the law of imputation of an agent's knowledge unsettled), observed that the Burmeisters 'should now pursue their substantive claims against the other defendants rather than be granted a third chance to continue

⁸⁶ Ibid, at [69]–[71].

⁸⁷ *Dollars & Sense Finance Ltd v Nathan* [2007] 2 NZLR 747; (2007) 8 NZCPR 333 (CA) at [120] per Glazebrook J (for the majority).

⁸⁸ *Burmeister v O'Brien* (unreported, HC Tauranga CIC-2005-470-396, Stevens J, 13 November 2008).

with their ill-fated claims against the ASB'.⁸⁹

The application for leave was dismissed in four succinct paragraphs. The Judge, noting that the test for obtaining leave as set out in *Waller v Hide*⁹⁰ was a demanding one, observed that the same conclusions had been reached in the two well-reasoned decisions and the law on the imputation point had been well-settled by the Supreme Court in *Dollars & Sense Finance Ltd v Nathan*.

This decision was handed down on 13 November 2008, just over 3 years after the Burmeisters filed their claim.

Fiscal risk/time analysis

On 13 November 2008, the figures were:

Accelerating mortgage:	\$317,146.00 (approx)
Available compensation:	\$215,000.00
Gap (deficit)	\$102,146.00
Limitation	
August/September 2008:	out of time
14 April 2009:	in time (application for compensation lodged on 22 October 2008).

The proceedings against the registered proprietor — back on track

On 23 March 2009, the Burmeisters returned to the High Court to pursue claims against the O'Briens, Geoffrey and John Clayton, and Mark Henley-Smith. The hearing spanned 2½ months. Asher J's decision was released on 1 December 2009.⁹¹

This article concentrates solely on two aspects of the lengthy decision,⁹² but also notes that, presumably as a result of the ASB proceedings, there was no claim for fraud against Mark Henley-Smith.

Was there Land Transfer Act fraud?

At the time of this 2009 hearing, John O'Brien and Gillian O'Brien were the sole trustees. Patricia Patterson had resigned.

The Burmeisters alleged that the O'Briens were guilty of land transfer fraud within the meaning of s 62 of the LTA 1952 (NZ).

⁸⁹ Ibid, at [22].

⁹⁰ *Waller v Hide* [1998] 1 NZLR 412 (CA).

⁹¹ *Burmeister v O'Brien* [2010] 2 NZLR 395; (2011) 12 NZCPR 9.

⁹² Other claims comprised:

- (i) against both of the O'Briens: their knowing receipt of 1 Lotus Avenue and unjust enrichment (successful);
- (ii) against both of the Claytons: deceit in the representations they made concerning the transfer transaction (successful against Geoffrey Clayton only); accessory liability (successful against Geoffrey Clayton only) and breaches of the Fair Trading Act 1986 (successful against Geoffrey Clayton only).
- (iii) against Mr Henley-Smith: negligence for his role in facilitating the transfer to the O'Briens; accessory liability; and breach of fiduciary duty and conflict of interest (all were unsuccessful).

Asher J found on the following grounds that Mr O'Brien had acted fraudulently:

- (i) he knew that the Burmeisters were not willing sellers and that they thought that they continued to own the property;
- (ii) he knew that they would not have signed an agreement for sale and purchase or a transfer to his trust;
- (iii) he either forged or arranged the forgery of their signatures on the agreement for sale and purchase prepared for the ASB;
- (iv) to his knowledge, the O'Brien Trust did not pay the \$43,000.00 cash notionally required to settle the transfer to it to the designated purchaser (ICMG Property Ltd) because it was an in-house transaction designed to extract a mortgage from the ASB, and the higher transfer figure was put in to deceive the bank;
- (v) he uplifted the title and discharge of mortgage from the Burmeisters, knowing that he was going to use it to transfer the property from them to his own family trust, and knowing that they did not know this and would have refused to give him the documents if they had;
- (vi) he instructed the solicitor acting for the ICMG group to fill in the details of the transfer, knowing that it was contrary to the Burmeisters' wishes;
- (vii) he arranged for his accountant and lawyers to obtain the mortgage advanced from the ASB and uplift the money, and for that money to go to the ICMG group for its general purposes, knowing that the advance was obtained by tricking the Burmeisters into providing the transfer, and by misrepresenting the true position to the ASB.

The Judge also considered Mrs O'Brien an active participant in these transactions.

In his view, the O'Brien Trust, when it purchased the property, did so fraudulently to the knowledge of its trustees. It was actual dishonesty in that the O'Briens knew that the Burmeisters were being cheated out of their title, and carried out actions to perpetrate this.⁹³

Was the investment scheme a buy-back transaction for the purposes of the CCCFA 2003?

The Burmeisters, bringing the action against the O'Briens and both of the Claytons, argued that the CCCFA 2003 was relevant: the investment scheme was a buy-back transaction for the purposes of the CCCFA 2003, the ASB was linked and the terms of the transaction were oppressive.

Asher J considered s 8(1) of the CCCFA 2003 which, at the time of the decision, stated:⁹⁴

8 Meaning of buy-back transaction

⁹³ The unchallenged landmark authorities are *Assets Co Ltd v Mere Roihi* [1905] AC 176 at 210; (1905) NZPCC 275 at 298 (PC) per Lord Lindley; *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101 at 106–7; (1925) NZPCC 267 at 272 (PC) per Lord Buckmaster.

⁹⁴ Section 8 was amended by s 7 of the Credit Contracts and Consumer Finance Amendment Act 2014.

- (1) In this Act, unless the context otherwise requires, buy-back transaction means a transaction under which —
- a. a person (the occupier) transfers, or agrees to transfer, an estate in land to another person (the transferee); and
 - b. the land is the principal place of residence of the occupier at the time that the occupier enters into the transaction; and
 - c. the occupier, or a person designated by the occupier, has, after the transfer, the right to occupy the whole or any part of the land; and
 - d. 1 or more of the following applies:
 - I. the occupier, or a person designated by the occupier, has the right to repurchase the estate in the land in whole or in part;
 - II. there is an understanding between the occupier and the transferee that the occupier, or person designated by the occupier, has a right to repurchase the estate in land in whole or in part;
 - III. there is an understanding between the occupier and any buy-back promoter that the occupier, or a person designated by the occupier, has a right to repurchase the estate in the land in whole or in part; and
 - e. the occupier is a natural person who enters into the transaction primarily for personal, domestic, household, or investment purposes.⁹⁵

While the Judge considered that the requirement of s 8(1)(a) and (b) were met, s 8(1)(c) and (d) were not. The Burmeisters did not in fact have any legal 'right' to occupy the whole or any part of the land once it had been transferred to the O'Briens, nor did they have a right to repurchase the land because they believed they continued to own it, save for the presence of the trust. In short, the transaction was a transfer from the Burmeisters to the O'Brien Trust, without any legal right of occupation or re-purchase. And thus the Judge held that the Burmeisters' entitlement to get the property back arose from the fraud practised on them and the constructive trust on which the property was held, not from any buy-back arrangement.

But the property was not returned

Despite (finally) a finding that the O'Briens had been guilty of fraud, Asher J declined to give an order under s 85 of the LTA 1952 (NZ)⁹⁶ to reinstate the Burmeisters as rightful owners of 1 Lotus Avenue. This omission does not reflect the true essence of the Torrens system and consequently led to the unfortunate misunderstanding as to what compensation was payable.⁹⁷

Fiscal risk analysis

As at 1 December 2009 when the proceedings against both the O'Briens and the ASB were completed, the approximate financial situation comprised:

⁹⁵ Section 8(1)(e) was amended by s 7 Credit Contracts and Consumer Finance Amendment Act 2014 to read:

(e) the occupier is a natural person; and
 (f) the relevant finance is to be used, or is intended to be used, wholly or predominantly for personal, domestic, investment, or household purposes

A new s 8(1)(A), relating to s 8 (1)(F), was inserted.

⁹⁶ Land Transfer Act 1952, s 85 'Court may order former certificate of title to be cancelled'.

⁹⁷ See discussion at 'The measure of damages'.

Accelerating mortgage:	\$360,376.00 (approx)
Available compensation:	\$215,000.00
Gap (deficit)	\$145,376.00

The Registrar-General — what risk analyses could have been undertaken?

On 22 October 2008, the Burmeisters brought proceedings against the Registrar-General of Land claiming compensation ‘following the registration of documents arising from fraudulent transactions that deprived them of title to their property’.⁹⁸

If the Registrar-General had paid out the claim (\$215,000.00) after the substantive judgment on 1 December 2009 the gap, as shown above, was \$145,376.00. If this looked like an impossible task for the Burmeisters to meet, it pales in comparison to the gap on 26 August 2014.

The Registrar-General defended the Burmeisters’ claim for compensation. Before that litigation could commence, a preliminary decision as to whether the Burmeisters were simply out of time was required.

A risk analysis for the Registrar-General

This article argues that the Registrar-General might have been wise to assess the risk of his proceedings. This, of course, depends on how he interpreted his role: to raise all available defences to protect the fund,⁹⁹ or to administer a beneficial fund?¹⁰⁰ Nonetheless, it may have been sensible to assess not only the Crown’s prospects of success but also the likely cost of its litigation. After all, on 1 December 2009, the pay-out, according to the writer, was (only) \$215,000.00.

Moreover, if he saw himself as administering a beneficial fund, he too would adopt a fiscal risk analysis to ensure that proceedings were expedited in an effort to protect the Burmeisters from the widening gap shown above.

A costs application

On 13 April 2010, Asher J determined the Burmeisters’ liability for costs in favour of John Clayton and Mark Henley-Smith,¹⁰¹ both of whom successfully defended the claims in the substantive hearing.¹⁰² Within the nine cases that are the subject of this article, this is the only glimpse a reader gets as to the extent of costs that this decade of litigation must have attracted.

The Burmeisters had been legally aided throughout.

Their liability under an order of costs against them was set at \$2050.¹⁰³

⁹⁸ *Burmeister v Registrar-General of Land* [2011] 2 NZLR 678; (2011) 12 NZCPR 704 at [1].

⁹⁹ Di Castri, *Registration of Title to Land*, looseleaf, orig 1987, vol 3, Carswell, Canada, at [990].

¹⁰⁰ See *Solak v Registrar of Titles* (2011) 33 VR 40; [2011] VSCA 279 at [88] as cited by Low and Griggs, above n 7.

¹⁰¹ *Burmeister v O’Brien* (unreported, HC Tauranga CIV-2005-470-396, 13 April 2010).

¹⁰² See ‘The proceedings against the registered proprietor — back on track’ above.

¹⁰³ Legal Services Act 2000 s 40 (now repealed) as it applied when the Burmeisters were granted legal aid. See now s 45(1) of the Legal Services Act 2011.

Asher J declined to order the Burmeisters to pay the \$2050 contribution to John Clayton. Had the Burmeisters not been legally aided, the Judge would have ordered costs of \$54,005.62. (These were the costs charged. Scale costs would have been \$91,243.58.)¹⁰⁴

Neither did the Judge award the contribution to Mark Henley-Smith. The costs that would have been awarded if there had been no legal aid, discounted because counsel representing a fellow practitioner had charged at a reduced rate, would have been \$53,865.39.

Limitation — were the Burmeisters out of time?

In the preliminary issue — whether the Burmeisters' claim was time-barred by s 180 of the LTA 1952 (NZ) — Asher J¹⁰⁵ focused on five possible dates from which the limitation period could run:

- (i) 14 November 2001
 - the date of actual deprivation of the legal estate by the registration of the transfer and mortgage;
- (ii) September/October 2002
 - when the Burmeisters discovered that the title to the house was no longer in their name;
- (iii) April 2003
 - when the Burmeisters read the Sunday Star Times article and went to see solicitors;
- (iv) Either
 - a. 30 August 2006
 - when the Burmeisters' claim against the ASB as mortgagee was struck out; or
 - b. 13 November 2008
 - when leave to appeal was declined;
- (v) 1 December 2009
 - when the substantive judgment for the Burmeisters finding fraud was delivered.

With the exception of the April 2003 date which was pivotal, the Judge could have simply dismissed the more recent dates. They were not relevant. They were well within the 6 year limit and required no further discussion.

The parties accepted that the limitation issue to be determined under s 180(2) of the LTA 1952 (NZ) was the date on which the Burmeisters became aware, or but for their own default might have become aware, of the existence of the right to make a claim. For ease of reference, s 180(2) is repeated:

For the purposes of this section, the date when the right to bring an action accrued shall be deemed to be the date on which the plaintiff becomes aware, or but for his own default, might have become aware, of the existence of his right to make a claim.

¹⁰⁴ Legal Services Act 2000 s 40(3) (now repealed) (see now s 45(5) of the Legal Services Act 2011) enables the court to specify the amount that the person would have been ordered to pay if not on legal aid.

¹⁰⁵ *Burmeister v Registrar-General of Land* [2011] 2 NZLR 678; (2011) 12 NZCPR 704.

The Judge noted that subs (2) (added by s 5 of the Land Transfer Amendment Act 1959) constituted a statutory recognition of the principle of reasonable discoverability. This therefore ruled out Option (i) above. Indeed, there was no suggestion by either party that option applied — at that stage, the Burmeisters were unaware of the true nature of the transaction.

That left four options.¹⁰⁶

Option (ii)

Did time run from September/October 2002 when the Burmeisters learnt that the O'Briens were registered on the title? Asher J considered that the answer to this question turned on the words, (as they appear in s 180(2) of the LTA 1952 (NZ)) 'becomes aware, or but for his own default might have become aware, of the existence of his right to make a claim'. Under s 180(2), more is required than just the knowledge of the loss. Knowledge of the other facts that establish the 'right to make a claim' is also required. In September/October 2002, the Burmeisters became aware that title to their property was no longer in their names, but they did not know that they had been subjected to a fraud. In essence, they did not have sufficient knowledge to trigger the running of time against them.

The Judge then considered what the plaintiffs might have discovered but for their own default. The words 'his own default' in s 180(2) stand apart from the more familiar notion of reasonable discoverability — an objective test (see, for instance, the Limitation Act 2010). Under s 180(2) the test is subjective there must have been fault by the Burmeisters in their particular circumstances. The Judge found no such default, thus cancelling out the application of Option (ii).

Option (iii)

In April 2003, the Burmeisters, having read about the scam in the media, sought legal advice and became aware that they had been defrauded. Asher J was satisfied that it was only at this point that the Burmeisters became sufficiently aware of the existence of the right to make a claim.¹⁰⁷

Options (iv) and (v)

Although this was not necessary, Asher J considered these options, and ruled out their application.

He disagreed that the 1 December 2009 date (the date when the deprivation is confirmed by legal decision) was the correct starting point. The deprivation suffered by the Burmeisters occurred with the registration of a person with a competing interest as a proprietor. That person was the ASB and its mortgage was registered on 14 November 2001. After noting formidable practical

¹⁰⁶ In considering these four options, Asher J referred to Hammond J's observations in *Melville-Smith v Attorney-General* [1996] 1 NZLR 596 at 600–1, where five different interpretations were considered.

¹⁰⁷ The court made no reference to decisions that substantiate this conclusion. See, for instance, *Beardsley v Registrar of Titles* [1993] 2 Qd R 117; *Breskvar v White* [1978] Qd R 187.

considerations¹⁰⁸ of the 1 December 2009, he saw ‘no great injustice in time being seen as running from when all the facts which constitute a cause of action under s 172(b) were known’.¹⁰⁹ Left unsaid in the proceedings is the obvious point that that claim must lie fallow until the substantial proceedings have been completed.¹¹⁰

Option (iv) was also discounted. The strike out action did no more than recognise that the ASB, when it obtained its title in 2001 had done so without fraud. It was not the event that caused deprivation to the Burmeisters. It followed that the consequent unsuccessful leave to appeal was also not such an event.

Thus, the limitation period began in April 2003. The period’s expiry was April 2009. The Burmeisters were therefore within the limitation period.

Fiscal risk analysis

Asher J’s decision was handed down on 3 May 2011. The financial risk for the Burmeisters was increasing markedly.

Accelerating mortgage:	\$429 260.00 (approx)
Available compensation:	\$215,000.00
Gap (deficit)	\$214,260.00

The appeal

The Registrar-General appealed that decision.¹¹¹ He argued that a plaintiff becomes aware of a right to make a claim when the facts giving rise to a right of action under s 172(b) of the LTA 1952 (NZ) exist and the plaintiff had discovered those facts in September/October 2002. All that is required under s 172(b) is discovery that another person has become the registered proprietor. He disagreed that the test under s 180(2) was a subjective one; and considered that ‘default’ had its ordinary dictionary meaning, namely, any failure in performance or failure to act.¹¹² Hence, he considered that the appropriate starting date for the 6 year limitation was September/October 2002.

The Court of Appeal¹¹³ upheld Asher J’s finding that the claim was not time-barred although the outcome was reached on a somewhat different basis. It observed that s 180(2) envisaged two possible scenarios:

- (i) that the Burmeisters had actual knowledge of the relevant facts (that is, they knew of or had discovered the existence of their right to make a claim); or

¹⁰⁸ *Burmeister v Registrar-General of Land* [2011] 2 NZLR 678; (2011) 12 NZCPR 704 at [51].

¹⁰⁹ *Ibid*, at [52].

¹¹⁰ If, for instance, the Burmeisters had lodged their claim at the beginning of the assessed six year period (April 2003), it would have remained dormant for more than 6½ years (until 1 December 2009).

¹¹¹ The Burmeisters cross-appealed. They advanced three other possible dates for the commencement of the limitation period. The Court of Appeal dealt with these three possibilities very briefly because the effect of upholding Asher J’s decision was that the claim had been filed in time.

¹¹² As footnoted in the judgment, John Simpson and Edmund Weiner *The Oxford English Dictionary*, 2nd ed, Clarendon Press, Oxford, 1989.

¹¹³ *Registrar-General of Land v Burmeister* [2012] NZCA 340; (2012) 13 NZCPR 504.

- (ii) that the Burmeisters might have become aware of or discovered the existence of their right to make a claim, if not for their own default.

With respect to the first scenario, the court, recognising that it was the registration of the ASB mortgage that barred the Burmeisters from bringing an action for recovery,¹¹⁴ ascertained that when they made their enquiries to LINZ, they only discovered that the title to their house was no longer in their names. There was no available evidence to show that LINZ informed them of the mortgage. Therefore they did not have actual knowledge of the existence of their right to make a claim at that time.

As to the second scenario, the court noted that the Burmeisters, from the outset, had some awareness that there could be a temporary transfer to a family trust and their understanding was that this would not put their house at risk. This had significant implications on the extent to which the Burmeisters were put on alert by the results of the inquiry to LINZ. Moreover, when faced with the information from LINZ they did take some steps. Given their 'naivety and trust of the Claytons',¹¹⁵ it was not unreasonable that they approached Geoffrey Clayton initially. The Burmeisters were then deflected by the response they received.

The court confirmed that there was no default on the Burmeisters' part as at September/October 2002 that prevented them from otherwise discovering the existence of their right to make a claim.

Fiscal risk analysis

The Court of Appeal's decision was handed down on 2 August 2012.

Accelerating mortgage:	\$500,054.00 (approx)
Available compensation:	\$215,000.00
Gap (deficit)	\$285,054.00

Proposed legislative changes: LINZ exposure draft Land Transfer Bill

Following an Issues Paper¹¹⁶ and Report,¹¹⁷ by the Law Commission, in conjunction with LINZ, LINZ released an exposure draft of the proposed Land Transfer Bill¹¹⁸ in May 2013.

In this exposure draft, there is no equivalent clause to s 180 of the LTA 1952 (NZ).

In the Limitation Act 2010, while s 11(1) provides that it is a defence to a money claim if a claim is filed after 6 years, s 11(2) provides for a late knowledge date in certain specified circumstances. In these circumstances, s 11(3) provides that it is a defence to a claim if the claim is filed at least 3 years after that late knowledge date.

¹¹⁴ Ibid, at [32].

¹¹⁵ Ibid, at [64].

¹¹⁶ Law Commission (in conjunction with LINZ), *Review of the Land Transfer Act 1952*, NZLC IP10.

¹¹⁷ Law Commission (in conjunction with LINZ), *A New Land Transfer Act*, NZLC R116.

¹¹⁸ This is available online at <www.linz.govt.nz/exposure-draft-bill> (accessed 20 October 2015).

In its 2010 Report,¹¹⁹ the Law Commission foreshadowed the introduction of these provisions in the Limitation Act 2010 and considered them adequate to address time limits to claims for compensation under the exposure draft.

A third party notice

The substantive proceedings for compensation were set down for trial in December 2013. Prior to that the Registrar-General sought and was granted leave to issue a third party notice on Mark Henley-Smith. The Registrar-General alleged that Mr Henley-Smith owed him a duty of care and that duty had been breached. The court, with cogent reasons, set aside that third party notice.¹²⁰

Were the Burmeisters entitled to compensation?

On the face of it, if Mrs Nathan loses this case she would be entitled to damages subject of course to limitation issues:

(Comment by William Young P in his dissenting judgment in *Dollars & Sense Finance Ltd v Nathan*)¹²¹

William Young P's comment is apposite. The Burmeisters first lost their case against the ASB on 30 August 2006. At that stage, they were eligible for state compensation. The succeeding two ASB decisions, that had little probability of success prolonged the litigation with some serious consequences.

The Registrar's defence — the Burmeisters were not 'deprived' and were not 'barred by the Act'

The Burmeisters sought compensation for their loss as a consequence of the fraud from the Registrar-General relying on the compensation provision in s 172(b) of the LTA 1952 (NZ).¹²² Although their argument was expressed incorrectly, in essence it was that they had been partially deprived of their land by the registration of the ASB mortgage and they were barred by the LTA 1952 (NZ) from bringing an action for the recovery of their unencumbered estate. As noted, the court had no precedent to follow for determining either the scope of the compensation right under s 172(b) or its measure.¹²³

The Registrar-General defended the claim, submitting that s 172(b) did not apply. He claimed that the Burmeisters were the authors of their own misfortune through their negligence in allowing themselves to be tricked into signing the documents and providing the fraudsters with their title to their land. This defence had two components:

119 See Law Commission (in conjunction with LINZ), *A New Land Transfer Act*, NZLC R116, at [4.34].

120 *Burmeister v Registrar-General of Land* [2013] NZHC 2777.

121 *Dollars & Finance Ltd v Nathan* [2007] 2 NZLR 747; (2007) 8 NZCPR 333 (CA) at [42].

122 *Burmeister v Registrar-General of Land* [2014] NZHC 631; (2014) 15 NZCPR 91.

123 The court does not discuss whether the Burmeisters have been *deprived* of an estate or interest in land or, alternatively whether they have *sustained a loss*. For an important discussion on the difference see P Carruthers and N Skead, '150 years on: The Torrens compensation provisions in the "last resort" jurisdictions' (2011) 19 *APLJ* 174, at Parts I and II. See also *Registrar of Titles (WA) v Franzone* (1975) 132 CLR 611; 7 ALR 383; 50 ALJR 4; BC7500057.

- (i) that the Burmeisters were not deprived 'of their estate in Lotus Avenue'; and
- (ii) that the Burmeisters were not persons who by the Act were barred from bringing an action for possession or other action for the recovery of that land

In determining the first issue,¹²⁴ Asher J saw no reason why the verb 'deprived' in itself implied a lack of carelessness on the part of the claimant. It did not infer a 'reasonable care test'.

He found nothing in the LTA 1952 (NZ) that indicates that 'deprivation' should be given a special and unusual meaning. There was also nothing in relevant authorities and commentaries that favoured that proposition.¹²⁵ He noted particularly the Court of Appeal's decision in *Miller v Davy*¹²⁶ that supports the proposition that carelessness in itself will not prevent recovery unless it was a direct cause of the loss.

With respect to the second issue,¹²⁷ the Judge concluded that the the Burmeisters were indeed barred by the Act. He did not accept the Registrar-General's argument that the words 'barred from the Act from bringing an action for recovery' required a person claiming under s 172(b) of the Act to prove that if the LTA 1952 (NZ) did not exist they would have succeeded before the courts on a specified action for 'the recovery of that land, estate or interest'. The Registrar-General claimed that because of their actions of carelessness, the Burmeisters would not succeed on a non est factum plea and, as a result, were not barred by the Act from bringing an action for recovery. It was noted that the Registrar-General expressly eschewed any reliance on contributory negligence as an answer to his claim. It is an established principle that carelessness in the form of contributory negligence in no defence against a claim for fraud.¹²⁸

Asher J observed that under the current legislation there was no discretion to reduce compensation for fault and no basis for reading in such a condition, or straining the natural meaning of 'deprived' and 'by this Act barred' by implying some qualifying words.

The court held that the Burmeisters could claim compensation.

¹²⁴ *Burmeister v Registrar-General of Land* [2014] NZHC 631; (2014) 15 NZCPR 91 at [23]–[39].

¹²⁵ Asher J relied on the following decisions and commentaries: *Diemasters Pty Ltd v Meadowcorp Pty Ltd* (2001) 52 NSWLR 572; [2001] NSWSC 495; *Behn v Registrar-General* (1979) 2 NSWLR 496; *Parker v Registrar-General* [1977] 1 NSWLR 22; *Fawkes v Attorney-General for Ontario* (1903) 6 OLR 490; *Swan v North British Australasian Company* (1863) 2 H&C 175; 159 ER 73; A Bradbrook, S MacCallum and A Moore, *Australian Real Property Law*, 3rd ed, Lawbook Co, Pyrmont, 2002, at [4.125], see now 6th ed, 2015, at [4.435]–[4.440]; P B A Sim, 'The Compensation Provisions of the Act' in *The New Zealand Torrens System Centennial Essays*, G W Hinde (Ed), Butterworths, Wellington, 1971, p 160; Law Commission, *Review of the Land Transfer Act 1952*, NZLC IP10, 2008.

¹²⁶ *Miller v Davy* (1889) 7 NZLR 515 (CA).

¹²⁷ *Burmeister v Registrar-General of Land* [2014] NZHC 631; (2014) 15 NZCPR 91 at [40]–[61].

¹²⁸ See *Maruha Corporation v Amaltal Corporation Ltd* [2007] 3 NZLR 192 (SC) referring to *Standard Chartered Bank v Pakistan National Shipping Corporation (No 2)* [2003] 1 AC 959; [2003] 1 All ER 173; [2002] 3 WLR 1547 (HL).

Proposed Changes: LINZ exposure draft Land Transfer Bill

The draft Bill changes the date at which to determine the amount of compensation payable. It is the amount of the actual loss and that loss is determined by reference to the value of the estate or interest in land to which the claim relates, including improvements, at the date on which the claim is made, not when the actual deprivation occurred.¹²⁹ However, if the proceeding is brought in the court and the court considers that the amount of compensation thus determined is inadequate or excessive, it may determine the compensation on any other basis it thinks fit.¹³⁰

The Bill also provides that the amount of compensation ordered by the Court, or accepted by the Attorney-General and the Registrar may include interest at the prescribed rate from the date of the claim to the date of judgment or acceptance.¹³¹ Therefore, unlike the current s 179 of the LTA 1952 (NZ) (fixed rate of 5%), there is allowance for the rate to be adjusted.

The compensation may be reduced if the court on court proceedings is satisfied that the claimant contributed to the loss. The amount of compensation payable may be reduced (including to nil) depending on the extent to which the claimant contributed to the loss.¹³² The current LTA 1952 (NZ) does not accommodate any such consideration.

Fiscal risk analysis

Again, the Registrar-General's claim was unsuccessful. The Burmeisters were rightfully entitled to compensation. While the parties continued to argue, the mortgage continued to soar.

Asher J's decision was handed down on 1 April 2014.

Accelerating mortgage:	\$619,215.00 (approx)
Available compensation:	\$215,000.00
Gap (deficit)	\$404,215.00

The measure of damages

The claim under s 172(b) [LTA 1952 (NZ)] is that the Burmeisters have been deprived of land through the registration of ASB's mortgage and that they are barred from bringing an action for recovery. That combination, on the present facts, must at least involve knowledge of the registration of the mortgage on 14 November 2001

¹²⁹ Exposure Draft Land Transfer Bill, cl 60, at <www.linz.govt.nz/exposure-draft-bill> (accessed 20 October 2015).

¹³⁰ Ibid, cl 61.

¹³¹ Ibid, cl 62.

¹³² Ibid, cl 63. As Asher J observed, the Law Commission, in its 2010 Report, p 5, noted:

Under the Contributory Negligence Act there would be no ability to reduce compensation where, for example, the complainant had facilitated the fraud by signing a blank transfer document. For this reason, we do not support applying the Contributory Negligence Act to compensation claims under the Bill. Rather, cl 20 [as it was then] of the deals directly with the matter and provides that compensation can be reduced where the complainant has contributed to the loss.

because that is the action that had the effect of barring recovery. If the mortgage had not been registered the Burmeisters could have recovered the property from the O'Briens.¹³³

Comment from the Court of Appeal in the limitation proceedings)

What is correct in the above statement and what is not?

First, as of 1 December 2009 (the substantive decision), the Burmeisters were not fully deprived of their land. The land was held by the O'Briens (who lost their indefeasible title through fraud) on constructive trust for them. Rather, they were deprived of an estate or interest in the land by the registration of the mortgage.

Second, quite correctly, the Court of Appeal explicitly recognises that it was the registration of the mortgage that barred them from bringing an action (the requirement under s 172(b) of the LTA 1952 (NZ)). The succeeding decisions on the measure of damages ignore this.

Third, the comment — 'If the mortgage had not been registered, the Burmeisters could have recovered the property from the O'Briens' — does not address the issue. In short, even although the mortgage is registered, the Burmeisters 'recovered' their property on 1 December 2009, albeit as mortgagors. The fact that the court did not exercise its powers under s 85 of the LTA 1952 (NZ) at that time is puzzling but does not detract from the simple question: who owned the land after the 1 December decision was released — the fraudulent O'Briens or the Burmeisters?

The answer to that question is obvious.

Moreover, to any advocate who argues that because the O'Briens were still on the title on 26 August 2014, they were the rightful registered owners (as trustees of the O'Brien Trust), then at that date the ASB mortgage was of no concern to the Burmeisters.

Total deprivation would only have occurred if the O'Briens had sold on to a bona fide purchaser (or if the ASB had exercised its power of sale):

Total deprivation occurs where the former registered proprietor has wholly lost ownership and interest in the land, and cannot regain status as the registered proprietor. This occurs when a new registered proprietor gains an indefeasible title in accordance with the immediate indefeasibility rule of *Frazer v Walker*¹³⁴ or the protection of bona fide purchasers for value . . .¹³⁵

Calculation as a 'subtraction'

The Burmeisters cannot claim compensation for the loss of their land. They are not barred from bringing an action for recovery. They have a claim for compensation that relates to the mortgage. That claim is the value of the mortgage together with costs but capped at \$215,000.00 (the value of the land at the time of deprivation).

The calculation for the measure of damages is expressed as a subtraction:

¹³³ *Registrar-General of Land v Burmeister* [2012] NZCA 340; (2012) 13 NZCPR 504 at [32].

¹³⁴ *Frazer v Walker* [1967] AC 569 (PC).

¹³⁵ Law Commission (in conjunction with LINZ), *Review of the Land Transfer Act 1952*, IP10, at [11.14].

An example of partial deprivation is the wrongful registration of the mortgage against the title. In such a case, the registered proprietor is entitled to compensation to discharge the mortgage. The deprivation can be conceptualised as the subtraction of the lesser estate (the mortgage) from the fee simple state of the registered proprietor.¹³⁶

A more explicit version is given by the court in *Russell v Registrar of Land* (a case where the plaintiffs who had been deprived of a leasehold estate in part of the land comprised in their lease were entitled to compensation):

the measure of damages is, in our opinion, the value to [the plaintiffs] of that part of the land from which they have been evicted. That value must be ascertained by determining what the value of the whole leasehold was to the plaintiffs immediately prior to the eviction, and what the value of that portion of the land remaining in the plaintiffs was to the plaintiffs immediately after the eviction: the difference between the two values is the measure of damages.¹³⁷

With reference to the Burmeisters, this translates as follows:

Value of the whole land before eviction:	\$215,000.00 (approx)
Value of portion remaining after eviction:	\$43,000.00
Difference = measure of damages	\$172,000.00

In the penultimate decision¹³⁸ the Burmeisters submitted that they should be awarded the full amount (something in excess of \$640,722.91) needed to discharge the mortgage.

Asher J observed that counsel was effectively arguing ‘for a gloss on the section’¹³⁹ whereby despite its plain words the court nonetheless has an overall discretion. The court was unable to so ‘contort the language’,¹⁴⁰ noting that such an interpretation would ‘do violence to the language of s 179’ and would ‘vary the express and unambiguous words in the Act on the grounds of fairness’.¹⁴¹ Asher J refused to do that.

For the same reason, the Judge refused to award compound interest. The reference in s 179 is to interest at 5%. There is no reference to compounding interest. The rate was explicit and it could therefore be anticipated that the legislature would have expressly provided for any rate of interest beyond ordinary interest and it did not do that.

He directed the plaintiff to file further submissions as to the date of deprivation (although this was already ascertainable)¹⁴² and the quantum of the amount of compensation on that date and the amount of interest owed as ordinary interest which was not compounding.

¹³⁶ Law Commission (in conjunction with LINZ), *A New Land Transfer Act*, NZLC R116, at [11.13].

¹³⁷ *Russell v Registrar of Land* (1906) 26 NZLR 1223 (CA) at 1231.

¹³⁸ *Burmeister v Registrar-General of Land* [2014] NZHC 631; (2014) 15 NZCPR 91.

¹³⁹ *Ibid*, at [65].

¹⁴⁰ *Ibid*.

¹⁴¹ *Ibid*, at [68].

¹⁴² Oddly, the Judge observed that the date of deprivation was unclear — was it when the property was transferred from the Burmeisters in 2001 or was it when the mortgage was registered? In his earlier judgment on the limitation issue, when dealing with the Option (i) date (14 November 2001), he stated that ‘the date of the actual deprivation of ownership [was] when the transfer from the Burmeisters to the O’Briens and discharge of mortgage,

The final decision

In the final decision,¹⁴³ all parties accepted that the starting date for the measure of damages was \$215,000 (the value of the property when it was transferred in 2001). This, of course, is incorrect.

The Court thus proceeded to add 5% normal interest to that amount up to the date of the judgment. This amounted to \$349,374.98 (\$134,374.98 more than \$215,000.00).

For the undoubtedly weary Burmeisters, this was windfall that was handed to them mistakenly.

Much of the decision concerned whether certain payments initially made to the Burmeisters by the O'Briens should be deducted from the \$215,000.00. This discourse was irrelevant.

The Risk Analysis Model — what might have happened?

This article encourages the adoption of a simple risk analysis model when embarking on the type of complex litigation in which the Burmeisters were involved.

It is therefore paramount that the article attempts to describe to any reader what might have happened if such a model had been implemented.

The start: which parties should be joined initially?

This is possibly the most problematic decision. Should the mortgagee have been joined as the seventh defendant?

The article suggests probably not for there is always the risk that the mortgagee applies to be struck out and the ensuing litigation is inverted.

Conversely, there is also the chance that the litigation proceeds more conventionally and one decision decides both the fate of the new registered proprietor and the succeeding mortgage.

This article proceeds on the former choice.

What would have happened if the ASB had initially not been joined?

If the ASB had not been joined as a defendant, the litigation would have started with the substantive proceedings: land transfer fraud, buy-back transactions pursuant to the CCCF Act 2003, knowing receipt, deceit, breaches of the Fair Trading Act 1986, and, as against Mark Henley-Smith, negligence, accessory liability, breach of fiduciary duty and conflict of interest. It is fair to assume that the Burmeisters might have included a claim that Mark Henley-Smith had been fraudulent although this was more relevant to an action against the ASB.

and the mortgage between the O'Briens and the ASB, were registered'. In any event, a simple search of the title would have shown that these three transactions occurred simultaneously on that date.

143 *Burmeister v Registrar-General of Land* [2014] NZHC 2033; (2014) 15 NZCPR 871.

The proceedings would have been as long as the actual substantive proceedings in 2009 but would have occurred 4 years earlier in late 2005. In the substantive proceedings, the hearing began in March 2009, took 2½ months, and the decision was released on 1 December 2009 — effectively a 9 month exercise. Had the ASB not been joined, the Burmeisters would have cleared the hurdle against the O'Briens by mid/late-2006. The fiscal time risk analysis would have largely mirrored the date of delivery of the first ASB decision (30 August 2006):

Accelerating mortgage:	\$242,000.00 (approx)
Available compensation:	\$215,000.00
Gap (deficit)	\$27,000.00
Limitation	
August/September 2008:	2 years left
14 April 2009:	2 years, 8 months left

The Burmeisters would have also lowered their expectations of possible claims against the ASB: there was no buy back transaction so there was no argument about the mortgage being an linked transaction. Therefore a significant portion of the judicial discussion in the ASB proceedings would have simply fallen away.

The claim that Mark Henley-Smith had been fraudulent in his role as agent for the ASB and that that fraud could be visited to the bank would have remained alive. Had the ASB proceedings commenced in early 2007, the Burmeisters may have been less transfixed by the *Dollars & Sense* proceedings as the Court of Appeal decision had yet to be released.¹⁴⁴

When should a party accept a court ruling and simply move on?

In the first ASB proceedings, Associate Judge Abbott spent little time on the issue of whether Mark Henley-Smith's fraud (if he had been fraudulent) could be visited on the ASB. Citing with approval the well-known decisions that preceded the Supreme Court's decision in *Dollars & Sense Finance Ltd v Nathan*,¹⁴⁵ the Judge found no obligation or rule of law to support this.

Under the risk analysis model, this proceeding would have been brief.

In any event, there was little, if any, reason to continue to pursue the ASB unless the prospects of success were very high and, irrespective of which model was being used, this was not the case. The Judge himself suggested that the Burmeisters accept their defeat:¹⁴⁶

Any transfer back to Mr and Mrs Burmeister can be made subject to the ASB mortgage.

It may have been useful for the Judge to have spelt that out in a little more detail: if the ASB mortgage is bona fide, the Burmeisters have been partially deprived and as they are barred by the Act from bringing an action for recovery they are eligible for State compensation.

¹⁴⁴ *Dollars & Sense Finance Ltd v Nathan* [2007] 2 NZLR 747; (2007) 8 NZCPR 333, released 4 May 2007.

¹⁴⁵ *Dollars & Sense Finance Ltd v Nathan* [2008] 2 NZLR 557; (2008) 9 NZCPR 116 (SC).

¹⁴⁶ *Burmeister v O'Brien* (2006) 7 NZCPR 440 (HC) at [68].

What compensation is the plaintiff eligible for and what is the cap?

Under the risk analysis model, one might have expected the ASB decision to have been completed by mid-2007.

Accelerating mortgage:	\$267,033.00 (approx)
Available compensation:	\$215,000.00
Gap (deficit)	\$52,033.00
Limitation	
August/September 2008:	approx 1 year left
14 April 2009:	approx 1 year, 8 months left

As the deficit is increasing by this stage, all parties should be fully focused on achieving a solution quickly.

What is the time limitation for making a compensation claim?

As the above table shows, in mid-2007 there would have been no limitation issue. The Burmeisters were well within both dates.

Thus, two of the nine Burmeister decisions (one an appeal decision) would simply not have happened.

What role should the Registrar-General adhere to?

If the Registrar-General adopted an adversarial role, his claim would be limited to whether the Burmeisters were eligible for compensation and, if so, what was its measure.

If this proceeding was heard in late 2007, the gap between the capped amount (\$215,000.00) and the accelerating mortgage (approximately \$282,000.00) would have been approximately \$ 67,000.00.

This article suggests that, even if an adversarial role is appropriate, the Registrar-General would need to assess whether his prospects of success are promising enough to outweigh simply settling the claim at \$215,000.00 and thus, in this model, allowing the Burmeisters a reasonable chance of finding the outstanding \$67,000.00.

March/April 2015

At risk of repetition, the last four entries on the title to 1 Lotus Avenue are:

- 13.6.2003 at 9.00 am: Caveat (5622121.1) by Ken Sidney Burmeister and Valerie Joan Burmeister
- 30.3.2015 at 7.00 am: Court Order (10015570.1) vesting the within land in Kenneth Sydney Burmeister and Valerie Joan Burmeister
- 7.4.2015 at 1.27 pm: Withdrawal of Caveat 5622121.1
- 7.4.2015 at 1.27 pm: Discharge of Mortgage 5107414.3

Nothing happened on the title for almost 12 years. This article argues that the court, pursuant to s 85 of the LTA 1952 (NZ), should have given a direction to the Registrar-General to correct the title by restoring the Burmeisters as rightful registered proprietors on 1 December 2009. At the

very least at that stage, the court should have reminded the Burmeisters that they could apply to the court for such an action. If that had happened, both the court order and the withdrawal of caveat would have occurred in December 2009/January 2010. This would then have left only the issue of the registered mortgage for which the Burmeisters were entitled to claim state compensation as far as the cap would allow.

The four entries portray a very different story, one which the writer suggests was unnecessary.

And, finally, there is no public clue as to how the Burmeisters met the deficit between the compensation the court allowed and the outstanding amount on the mortgage: \$291,625.02 (that the writer argues is short by \$134,374.98). One might be tempted to suggest that the costs presumably awarded against the Registrar-General for his unsuccessful proceedings¹⁴⁷ may have been set off against the deficit. However, this is highly unlikely. The Burmeisters were legally aided throughout and would be required to repay some of that funding out of costs awarded to them.

As already suggested, it is also very unlikely that the ASB, the only entity that could forgive the debt, would be minded to do so.

And hence the mysterious ending — who paid the deficit?

Is this really a fairy tale ending? The writer thinks not. While there are very few glimpses of the human side of the Burmeisters, there is a poignant reference by Asher J in the 2009 substantive proceedings:

Mr Burmeister is now 67 years of age and Mrs Burmeister is 65. They have been married for 45 years and have four children and five grandchildren.¹⁴⁸

The final decision was handed down on 26 August 2014. Mr Burmeister would be 72/73; Mrs Burmeister 70/71. Quite simply, some of their best years of retirement and fun with their children and grandchildren were clouded by fraught Court proceedings.

Conclusion

This article's primary focus is on the importance of planning complex land transfer litigation, the end point of which will likely involve state compensation for an aggrieved original registered proprietor who has suffered deprivation (full or partial) of land or an estate or interest in land or who has sustained loss or damage by the wrongful inclusion of land in a title, and is barred by the operation of the LTA 1952 (NZ) from bringing on action for possession or recovery of that land, estate or interest.

As this involves money, a basic fiscal risk analysis approach is necessary. In many situations, as in the Burmeisters' case, it will involve a bona fide mortgage that was registered by the new fraudulent registered proprietor. The simple table that this article suggests (as a guide only) forces the litigants to keep to a strict timetable in order to ensure, as best as is possible, that the accelerating mortgage does not totally outstrip available compensation. The

¹⁴⁷ In both *Burmeister v Registrar-General of Land* [2014] NZHC 631; (2014) 15 NZCPR 91 and *Burmeister v Registrar-General of Land* [2014] NZHC 2033; (2014) 15 NZCPR 871, costs were reserved.

¹⁴⁸ *Burmeister v O'Brien* [2010] 2 NZLR 395; (2011) 12 NZCPR 9 at [4].

other risk analysis involves time. Time begins to run when the plaintiff becomes aware, or but for his own default might have become aware, of the existence of his right to make a claim. That date must be ascertained on a conservative basis and again a strict regime must be adopted to ensure that the 6 year time limit does not expire. As this article demonstrates,¹⁴⁹ a careful scrutiny of both the widening monetary gap and the running of time would have resulted in a much improved result.

Woven within this analysis is current commentary on judicial interpretations of significant areas of Torrens law. Perhaps the most important of these is the Supreme Court's ruling in *Dollars & Sense Finance Ltd v Nathan*¹⁵⁰ that introduced the principle of vicarious liability of a mortgagee for its agent's fraudulent actions.

And, finally, as the first court proceedings in New Zealand on the determination of the scope of a registered proprietor to obtain compensation under s 172(b) of the LTA 1952 and the measure of that compensation, this article suggests that the courts' interpretation of what deprivation or loss had occurred and of what measure was appropriate was incorrect. The Burmeisters were not permanently deprived of their land and they were not barred by the Act from recovering it. They were deprived of their unencumbered interest of their land and were barred by the Act from that recovery because of the registration of the bona fide ASB mortgage. The compensation related to the mortgage, capped at the value of the land at the time of deprivation. As the court observed in *Schmidt v Registrar-General of Land*:

That is because *Parker* [*Parker v Registrar-General of Land* [1977] 1 NSWLR 22 (CA)], like *Burmeister*, involved a fraudster convincing the claimants to sell their house as part of a fraudulent scheme. The property was transferred back to them after the transfer was voided by fraud [in the case of the Burmeisters after a very long delay] but subject to a mortgage they had to pay off.¹⁵¹

The Burmeister saga plays into the hands of advocates for private title insurance. Had the Burmeisters had private insurance once they recovered their land a simple application to their insurance company to pay off the full amount of the ASB mortgage would have 'put them back to the way they were'.¹⁵²

¹⁴⁹ See 'The Risk Analysis Model — what might have happened?' above.

¹⁵⁰ *Dollars & Sense Finance Ltd v Nathan* [2008] 2 NZLR 557; (2008) 9 NZCPR 116 (SC).

¹⁵¹ *Schmidt v Registrar-General of Land* [2015] NZHC 2015 at [19(b)]. For details of this case, see above n 6.

¹⁵² *Burmeister v O'Brien* [2010] 2 NZLR 395; (2011) 12 NZCPR 9 at [2].